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Supreme Court, U.S.
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No. 10-

IN THE
SUPREME COURT OF THE UNITED STATES

HILLSIDE PRODUCTIONS, INC., GARY RONCELLI and JOSEPH VICARI,

Petitioners,

v.

COUNTY OF MACOMB, MICHIGAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit will permit courts to ignore decisions of this Court as well as precedent from the Sixth Circuit and decisions of other federal circuit courts, which is necessary to secure and maintain uniformity of this Court's decisions, avoid conflicts with this Court, and avoid conflict with other circuits

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit which will permit federal courts to render meaningless the validity and enforceability of evidentiary orders and orders on motions in limine, the viability of sanctions provision of Fed. R. Civ. P. 37(c), and the standards of excluding expert witness testimony at trial

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of this Court and other federal circuit courts by adding an additional element to a plaintiff's burden of proof when asserting a substantive due process claim

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of this Court and other federal circuit courts

regarding Fed. R. Civ. P. 50 motions and whether motions made during trial must be made in writing

PARTIES TO THE PROCEEDING

Petitioner Hillside Productions, Inc., was the plaintiff/counter-defendant and appellant/cross-appellee below. Petitioners Gary Roncelli and Joseph Vicari were the plaintiffs and appellants below.

Respondents County of Macomb, Michigan was the defendant/counter-plaintiff and appellee/cross-appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Hillside Productions, Inc., a Michigan corporation, has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's decision denying petitioners' motion for judgment as a matter of law or in the alternative, for a new trial is unreported and is reproduced in the Appendix, App. A1-A28. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc is unreported and is reproduced in the Appendix, App. A68-A69. The decision of the United States District Court for the Eastern District of Michigan denying "Defendant's renewed motion for judgment as a matter of law" and denying Plaintiffs' "motion for judgment as a matter of law, or in the alternative, for new trial" is unreported and is reproduced in the Appendix, App. A29-A48. The judgment entered in the United States District Court for the Eastern District of Michigan is unreported and is reproduced in the Appendix, App. A59-A51. The decision of the United States District Court for the Eastern District of Michigan denying Plaintiffs' motion *in limine* as to the advice of counsel defense is unreported and is reproduced in the Appendix, App. A52-67.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc was filed on August 3, 2010. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming certain decisions of the United States District Court for the Eastern District of Michigan regarding evidentiary rulings and orders on motions *in limine* which were granted in favor of petitioners and then subsequently reversed during trial, as well as rulings which added to petitioners' burden of proof in order to support their substantive due process claim and which did not consider the "unique circumstances" under which petitioners made their Fed. R. Civ. P. motion and required such a motion to be made in writing, and denying petitioners' petition for rehearing en banc. This decision, if left standing, would conflict with and contradict decisions of this Court and of the Circuit Courts. A decision by this Court also would provide guidance to the district courts as to the validity and enforceability of orders on motions *in limine*, the viability of the sanctions provision of Fed. R. Civ. P. 37(c)(1), the standards for excluding expert witness testimony at trial and whether Rule 50(a) must be made in writing. This case presents constitutional

questions of exceptional importance, particularly with respect to a plaintiff's burden of proof in a case asserting deprivation of substantive due process rights.

A. Facts Of The Case

On May 19, 1999, Hillside Productions, Inc. ("Hillside") and the County of Macomb, Michigan ("the County") entered into a Sublease for Hillside's exclusive use of the Freedom Hill Amphitheater area ("the Amphitheater"), located within the County's Freedom Hill County Park ("the Park"), and shared use of the rest of the Park. On February 19, 2000, Hillside and the County amended the Sublease and extended its term to 2020, with two ten-year renewal terms.

After that amendment, Hillside began making substantial improvements to the Amphitheater at a cost of approximately $3,500,000, and held nine concerts in 2000. At the direction of the Macomb County Parks and Recreation Commission ("MCPRC"), pursuant to the Sublease (¶6(d)), Hillside constructed underground improvements and incurred certain costs at the Park, for which the County was obligated to pay.

Although Hillside completed this work for the County, the County did not pay the almost $2,000,000 cost. Instead, the County demanded that Hillside try to recoup payment for these costs by taking 75% of the annual revenue from parking at all events at the Park, with the County still

retaining 25% of these revenues. However, Hillside had to guarantee that the County would never receive less than $125,000 annually, even if the annual parking revenue was less than $500,000, and even though the County had not made that much in almost every preceding year.

At the end of 2000 Hillside began major renovations to the Amphitheater and applied for a Class C liquor license from the City of Sterling Heights, Michigan ("Sterling Heights"). From October 24 through November 15, 2000, Sterling Heights sent letters to the MCPRC, demanding that revenues be directed to Sterling Heights to support "services" in the Park, even though Sterling Heights had not provided any such services. Sterling Heights made it clear that if these payments were not forthcoming, Hillside would suffer -- Sterling Heights would not act on Hillside's liquor license application, and Hillside would have to obtain site plan approval (previously waived), and a Special Approval Land Use. The County never provided Hillside with any notice of these letters. As no payment was made, Sterling Heights did impose on Hillside new requirements, including a Special Approval Land Use and new building permit.

With one important exception, the County authorized its Parks Administrator, Anthony Casasanta, to sign Hillside's requests for building permits and other documents for submission to Sterling Heights. Casasanta even signed the Application for Special Approval Land Use, which was characterized at trial as "some sort of beyond-

the-norm approval." The County never objected to Casasanta signing these documents.

After obtaining the Special Approval Land Use, Hillside needed a building permit to begin Phase II of the Amphitheater project, including constructing a stage that had been torn down as part of the work under the building permit for Phase I. Hillside submitted the building permit request to Casasanta for his signature, but this time, the County directed Casasanta not to sign this document.

Instead, Hillside was advised that it needed the signature of John Hertel, Chairman of the County Board of Commissioners. Chairman Hertel and Corporation Counsel George Brumbaugh met with Gary Roncelli, Joseph Vicari and Hank Riberas of Hillside, and James Perna, then-President of the MCPRC, ostensibly about this request. Chairman Hertel advised petitioners that they would have to make significant concessions in the Sublease in favor of the County (and to the detriment of Hillside) in exchange for Hertel's signature on the building permit request. Brumbaugh never indicated that the County had not authorized Chairman Hertel's demands.

Under pressure because of an imminent deadline for completion of construction and the multimillion dollar investment already made the preceding year, petitioners had no choice but to submit to these demands in what became the Second Amendment to Sublease Agreement ("Second Amendment"), executed on March 29, 2001. The

County never disavowed the actions of Chairman Hertel (who did not testify at trial) in wringing these concessions from petitioners, nor did the County reject the proposed Second Amendment.

The County never advised petitioners before they undertook construction activities at the Park that the Michigan Department of Environmental Quality ("MDEQ") had sued the County relating to the landfill, or that a co-defendant in that action, the South Macomb Disposal Authority ("SMDA"), contemplated asserting claims against the County for exacerbation of the site. The County asserted at trial that it had no duty to disclose this information to its tenant before that tenant began construction on a site which was the subject of the litigation and possible cross-claims.

Once petitioners learned of the MDEQ lawsuit, they sought to have the County indemnify them from that suit and other claims. Not only did this not happen, but instead, petitioners were forced (in exchange for Hertel's signature on the permit request) to provide the County with a much broader indemnification than that which was set forth in the Sublease, exceeding the insurance coverage provisions of the Sublease.

The County continued to withhold information from petitioners to their disadvantage. In October, 2000, the County issued its Request for Proposals, Catering Services for the Independence Building in the Park ("Independence Hall"). It stated:

> No liquor license is available at the Independence building. All alcohol consumption is done either by being provided through a host without charge or through use of a temporary permit secured by a non-profit entity.

Parks Administrator Casasanta then received a letter from the Sterling Heights Police Department, dated November 6, 2000, advising the County that this representation violated the city's liquor ordinance. Casasanta admitted that the County did not issue a revised Request for Proposals, nor provide this information to petitioners. Instead, the County continued to lead petitioners to believe that they could operate at Independence Hall by having event hosts supply the alcohol. Vicari testified that had he known this was untrue, petitioners never would have submitted a proposal.

Instead, petitioners only learned that alcohol could not be served at functions after they had executed the Food & Beverage Agreement. This made it impossible for petitioners to operate at Independence Hall. From 2001 through 2004, petitioners were embroiled in contentious litigation with Sterling Heights, which ended only after the entry of a Consent Judgment in the matter of *Hillside Productions, Inc. v. Duchane et al.*, Case No. 02-73618 (E.D. Mich.).

Yet, despite the County's intentional misrepresentation regarding alcohol, petitioners did not abandon the Food & Beverage Agreement. They paid the $40,000 license fee for each year, and

attempted to operate after finally obtaining a liquor license in mid-2004 through the Consent Judgment. Once this occurred, Hillside realized that some minor improvements were needed so it could perform under the contract. Based on paragraph 17(b) of the Food & Beverage Agreement, Hillside - before January, 2005 - requested consent for three minor improvements, for which Hillside would pay: a partition at the end of one of the conference rooms for a coatroom during events, a locked storage area for liquor (as the Request for Proposals promised), and a place for the catering manager to meet with potential customers.

The MCPRC at its meeting on January 27, 2005 requested that corporation counsel and MCPRC members meet with Hillside to discuss this matter. Instead, on January 31, 2005, Assistant Corporation Counsel James Meyerand wrote to Hillside's counsel, stating:

> Please be advised that the Parks & Recreation Commission has directed me to contact you to request a meeting with you and representatives of Hillside to discuss the possible re-opening or modification of the food and beverage agreement at Independence Hall as well as the agreement covering the amphitheater.

Hillside's counsel responded on February 8, 2005 and March 1, 2005, that Hillside would never renegotiate to its disadvantage any agreement, just to obtain the approval of a routine request for which

the Food & Beverage Agreement specifically provided.

Despite another presentation by Hillside on March 22, 2005, the MCPRC took no action. Instead, the MCPRC demanded that a meeting with Hillside before the next MCPRC meeting. At that meeting, Hank Riberas on behalf of Hillside stated emphatically that Hillside would never agree to link the approval of this request to a renegotiation of the terms of the Amphitheater agreements. Riberas pointed out that the Food & Beverage Agreement was a license, not a lease, and that under the license, Hillside could use any portion of the building.

At the MCPRC meeting on April 11, 2005, President Perna discussed the meeting with Hillside. Based on that discussion, Commissioner Sauger made the following motion:

> to approve Hillside's request to use the following three areas; small office for catering manager, area for locked liquor and dry goods, in conference room area for coatroom with all renovations and changes paid by Hillside and forward request to Facilities & Operations for their approval.

The MCPRC refused to consider this motion, stating that it would approve Hillside's request only if Hillside agreed that it would collect parking revenue for all events - the County's obligation under the Second Amendment - at no charge unless the revenue exceeded $500,000, and then at only 25% of

the actual labor costs applied against any amount owed to the County above $125,000.00.

Hillside had collected the parking revenue without charge until 2004, when it asked the County to pay $3,482 of the approximately $56,000 cost it incurred for the labor performing this service. Hillside began collecting this revenue at the request of MCPRC President Perna, who wanted to clean up the questionable way the parking revenue had been collected before he took office, and install a checks-and-balances system. However, Hillside did not want to be contractually bound to do this forever at no charge to the County, when it cost Hillside annually in excess of $50,000.

Despite Hillside's opposition, the MCPRC voted on April 11, 2006

> to approve Hillside's request to use the following 439 square floor areas, small office for catering manager, storage room for the locked liquor and dry goods and conference room area for coatroom all changes for remodeling paid by Hillside Productions. In lieu of this space, Hillside Productions will continue to collect parking and cost of labor for parking, not to exceed 25 percent and will forward request to Facilities & Operation for recommendation and to submit to a full board for approval

This designation of square footage ran contrary to the license, which stated it was **not** a lease for specific property. Given this square footage, and the labor costs for parking revenue collection, Hillside was being charged the outrageous amount of approximately $127 per square foot annually for this space.

Riberas asked the MCPRC to reconsider this vote. When it became clear that this would not happen, and Hillside could not operate, Hillside had no choice but to send the County on July 5, 2005 its notice of termination pursuant to Section 6(A) of the Food & Beverage Agreement. The County did not respond in any way to this notice of termination.

The County did not cease demanding that Hillside renegotiate the Amphitheater agreements to its disadvantage. For example, at the meeting of the County's Operational Services Committee ("OSC") on October 18, 2005, Hillside requested a consent to the assignment of its interests in the Sublease to PSE Hillside, LLC, a business formed among petitioners and Palace Sports & Entertainment ("PSE"), a well-known entity which manages the Detroit Pistons basketball team and several concert venues, such as The Palace of Auburn Hills, DTE Music Theatre and Meadowbrook Music Theatre. Corporation Counsel Brumbaugh indicated that this consent could not be unreasonably withheld. Yet, instead of voting on that request, which was typical in a lease agreement and normally a routine matter, or even acting to obtain further information or perform due diligence as to PSE, the OSC voted to postpone any action on

the assignment until Hillside would open up and renegotiate the Amphitheater agreements.

This arbitrary action concerned PSE. PSE's Alan Ostfield testified that they did not want to be in a relationship where there would be tension or hostility between them and their landlord.

The County's wrongful actions continued. MCPRC President Perna testified at trial about conversations he had with other MCPRC members who had an improper purpose for voting in March, 2006 to keep all the parking revenues from County-sponsored events. Riberas testified that he met with MCPRC member Dino Bucci and had a telephone conference with County Board Commissioner/MCPRC member Phil DiMaria before the MCPRC vote on March 23, 2006. Riberas testified that Bucci and DiMaria had earlier advised him that the MCPRC was going to take this action.

Riberas testified that he told Bucci that this action would have "catastrophic consequences" on the transaction with PSE. Riberas also testified that Bucci told him that they knew they were not entitled to the money, but that they were doing this to bring petitioners "back to the table," in order to force petitioners to renegotiate the contracts to their disadvantage.

DiMaria likewise told Riberas that the County was going to keep all the parking revenue from the County events, not because it was entitled to the money, but to force petitioners to renegotiate the Amphitheater agreements to their disadvantage.

Riberas told DiMaria that the closing date for the PSE transaction was only a week away. DiMaria indicated that this timeline was the reason that the MCPRC was now taking this action. Indeed, when asked at trial if he told Riberas that they were taking this action to bring petitioners "back to the table" to force concessions from them, DiMaria did not deny it. Instead, he testified that he "may have" had that conversation.

The County's actions brought the PSE transaction to a halt. As of this date, the transaction has not closed and PSE Hillside, LLC is not willing to pay petitioners the $9,000,000 for 90% of Hillside's assets, as it would have if the transaction had closed at the end of March, 2006.

B. Proceedings Below

Petitioners filed suit through 42 U.S.C. §1983, alleging that the County had deprived petitioners of their rights to procedural and substantive due process and to equal protection of the laws, as guaranteed by the Fourteenth Amendment, and petitioner Hillside claimed that the County had breached its contracts with Hillside. The County filed a counterclaim alleging the Hillside breached the contracts and asserting tort claims against Hillside. The district court granted summary judgment in the County's favor on petitioners' procedural due process and equal protection claims, and granted summary judgment in Hillside's favor as to its breach of contract claim for the County's

withholding of Hillside's share of the parking revenue, and as to the County's tort claims.

During litigation, the County refused to provide any discovery as to any "advice of counsel" defense. Accordingly, six months before trial, petitioners filed their motion *in limine* for a determination as to whether the County could both withhold discovery because of an attorney-client privilege and assert an "advice of counsel" defense. In its decision, the district court recognized,

> Plaintiffs "are concerned that [D]efendants will raise at trial the defense that they acted in good faith or that they have some 'qualified immunity' because they allegedly relied on advice of counsel, and therefore did not intentionally violate [P]laintiffs' due process rights." Plaintiffs further "maintain that if [D]efendants intend to rely on advice of counsel as a defense to the claim of coercive extortion as a deprivation of constitutional rights, discovery as to that advice of counsel is relevant and should be discoverable." ... Plaintiffs are unsure whether Defendants will raise such defenses and therefore ask the court to either allow the discovery or preclude Defendants from asserting such defenses.

The district court continued:

> ... Defendants have plainly stated, "Defendants have not raised reliance on the advice of counsel as an affirmative defense to any of Plaintiffs' claims."

and then specifically ruled:

> The court reiterates that it will hold Defendants to this state of affairs, in the event that such defense is raised at a later point when further discovery is not feasible and when Plaintiffs may be prejudiced by such a change.

The case proceeded to a jury trial on petitioners' substantive due process claim and Hillside's remaining breach of contract claims and for damages as to the judgment in Hillside's favor on the breach of contract claim, and on the County's breach of contract claims. After selecting a jury, the district court heard argument on pending motions *in limine* on April 8, 2008. The district court, *inter alia*, granted petitioners' motion to preclude emotional appeals to the jurors as taxpayers as to "improper" appeals to emotion, and granted petitioners' motion to preclude reference to the County's financial condition "to the extent that it concerns the argument that the jury should grant no award because of Defendant's current or expected financial condition." The district court also granted petitioners' motion *in limine* to preclude any reference to a multimillion dollar settlement which petitioners had obtained four years earlier in a different case "to the extent that it concerns precluding the argument that Plaintiffs should

receive no award because of an earlier award in a separate case." Yet, during trial, the district court permitted the County to violate these pretrial evidentiary orders with impunity, and also permitted the County to introduce and have admitted evidence which the County had intentionally withheld from petitioners during discovery.

Based on the jury's verdict at the conclusion of the trial, the County obtained a judgment of no cause of action on petitioners' substantive due process claims and Hillside's breach of contract claims regarding security and the Food & Beverage Agreement. Hillside was awarded nothing as damages on the judgment it received arising from the County's breach of contract. Hillside obtained a judgment of no cause of action on all of the County's breach of contract claims, except as to gross revenue from ticket sales and the Food & Beverage Agreement. The County was awarded damages of $21,931.00 on its claim for one percent of the gross revenues from ticket sales, and nothing for Hillside's breach of the Food & Beverage Agreement. The County filed a motion for judgment as a matter of law and petitioners filed their motion for judgment as a matter of law or in the alternative, for a new trial. The district court denied both motions.

The United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") affirmed the district court's decision, and denied petitioners' petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

This Court should grant review of this petition because the rulings of the Sixth Circuit in this matter clearly decide important questions of federal constitutional law in a way which directly conflicts with decisions of this Court and other Circuits.

This Court has held that the use of motions *in limine* in advance of trial helps to avoid delays and ensures a fair trial by keeping from the jury evidence which is inadmissible or prejudicial. While the trial court has discretion in deciding the motion, once the trial court enters the order, that order must be observed by the litigants. The decision of the Sixth Circuit, if allowed to stand, would allow litigants to flagrantly ignore *in limine* orders with impunity because such actions would be deemed "harmless." It would also allow litigants to introduce evidence at trial which they withheld during discovery, contrary to the mandate of Fed. R. Civ. P. 37(c)(1).

The decision of the Sixth Circuit also contradicts prior precedent by requiring a plaintiff alleging a substantive due process violation to not only prove that a defendant acted arbitrarily and capriciously, but also that the defendant acted out of a constitutionally improper motive. Prior precedent had stated that if an official action was improper on its face, that was sufficient to establish a substantive due process claim. Prior precedent also held that if an official acted with an improper motive, it was the defendant's burden to show that it would have taken the same action absent the improper motive. Absent review by this Court, there will be confusion and

contradiction among the circuit courts regarding the elements of the plaintiff's burden of proof in cases asserting a substantive due process claim.

This Court has established that the exclusion of expert witness testimony must be based whether the methodology and reasoning of the expert opinion is based on generally accepted principles. The decision of the Sixth Circuit, if allowed to stand, would allow a trial court to exclude expert opinion testimony which was based on generally accepted principles but with which the trial court does not agree because of the trial court's weighing of the facts behind the expert opinion.

This Court has held that "unique circumstances" can be considered in cases in which the district court provided conflicting or incorrect information to parties on which they relied. The Sixth Circuit's decision disregarded this consideration, and allowed to stand the district court's requirement that Fed. R. Civ. P. 50(a) motions had to be in writing. Absent review, there will confusion among the courts as to the requirements of Rule 50(a) motions and all motions made during a hearing or trial and decisions which are inconsistent with this Court's decisions and the language of the Federal Rules of Civil Procedure.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH AND CONTRADICTS DECISIONS OF THE FEDERAL CIRCUIT COURTS AND RENDERS MEANINGLESS DISTRICT COURTS' EVIDENTIARY ORDERS AND THE SANCTIONS MANDATED BY FED. R. CIV. P. 37(c)(1)

On appeal to the Sixth Circuit, petitioners contended that the district court improperly permitted the County with impunity to violate the district court's orders regarding motions *in limine* and improperly admitted evidence which the County had withheld from petitioners during discovery. The Sixth Circuit decided that, despite the district court's orders regarding petitioners' pretrial motions *in limine* - which directed that the County could not contend it relied on the advice of counsel in making the decisions which petitioners claimed were constitutionally impermissible and could not argue to the jury that petitioners should receive no award because of an earlier award in a separate case - and despite the clear language of Fed. R. Civ. P. 37(c)(1), which should have precluded the County from introducing "advice of counsel" evidence, documents from Fifth Third Bank and witness testimony from corporation counsel because all this evidence had been intentionally withheld from petitioners by the County during discovery, the district court's admission of this evidence did not unfairly prejudice petitioners or, if it did constitute an abuse of discretion, was merely harmless error.

Petitioners submit that this decision conflicts with binding precedent and has the effect of rendering meaningless district courts' evidentiary orders and making the sanctions provisions set forth in Rule 37(c)(1) null and void.

The Court and the Circuit Courts, including the Sixth Circuit, have recognized that the use of motions *in limine* has evolved under the courts' inherent authority to manage trials, allowing a court to rule on evidentiary issues in advance of trial to avoid delay and ensure a fair trial by keeping from a jury evidence which would be deemed inadmissible or which is prejudicial in nature. *E.g.*, *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984) ("Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials."); *United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999); *Jonasson v. Lutheran Child and Family Svcs.*, 115 F.3d 436, 440 (7th Cir. 1997). While the decision to grant or deny a motion *in limine* is within a trial court's discretion, once an order deciding a motion *in limine* issues, that order must be observed by litigants as they would any other order of the trial court.

Prior to the decision in the instant case, the Sixth Circuit had consistently upheld the validity of orders regarding evidentiary issues raised by motions *in limine*. For example, in *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975), in which the trial court entered an order prohibiting references at trial to other pending cases

involving the same plaintiff "to keep extraneous issues out of the trial of the Goodyear case" (*Id.*), the Sixth Circuit held that the trial court was justified in excluding evidence on collateral matters, "the introduction of which would have lengthened the trial, confused the issues and possibly misled the jury" (*Id.*), citing to the Sixth Circuit's prior decision in *Olin-Mathieson Chemical Corp. v. Allis-Chalmers Mfg. Co.*, 438 F.2d 833 (6th Cir. 1971). There is no precedent in this Court or any other court which allows a litigant or its counsel intentionally to violate the trial court's ruling on a motion *in limine* with impunity.

Yet, if the Sixth Circuit's decision is allowed to stand in the instant case, then this will be the result - that litigants and their counsel can flagrantly defy orders ruling on motions *in limine* without fear of any penalty because such actions will only be considered "harmless" on review.

The Sixth Circuit recognized in its opinion in the instant case that by its orders the district court precluded the County from offering an "advice of counsel" defense (since it would not produce this evidence to petitioners during discovery). Yet, as the record shows, the County introduced evidence that the MCPRC members purportedly relied on the advice of their legal counsel when voting to keep for the County Hillside's share of the parking revenue (*e.g.*, R.306, Tr. 4/22/08 at 135-36; R.310, Tr. 4/28/08 at 83, 84-91, 95-96, 111, 173; R.312, Tr. 4/30/08 at 173-75; R.313, Tr. 5/1/08 at 77, 125).

While the Sixth Circuit's opinion states that the County did not rely upon a formal "advice of counsel defense," such evidence could only be seen by a jury as relevant to the County's claim that it did not act with a constitutionally impermissible motive when it decided to keep for itself Hillside's share of the parking revenues. Contrary to the Sixth Circuit's decision, this evidence was *not* elicited by petitioners' counsel; indeed, the record shows that each time the County introduced this evidence, petitioners' counsel strongly objected (*Id.*). For example, *the County's counsel* asked Commissioner Sauger, "And no motivation to extract any concessions from anybody?" and he answered, "No. I was doing it on the advice of our counsel and our Parks Board ... that said this was the best avenue to take" (R.313, Tr. 5/1/09 at 76-77), and *the County's counsel* read to the jury from Commissioner Raymus' deposition: "I just knew from what I heard from our attorney and from other people..." (*Id.* at 121). It could not be possible on this record for the Sixth Circuit to construe that *petitioners' counsel* elicited any of this testimony, or that this was not a proffer of an "advice of counsel defense."

The Sixth Circuit adopted the district court's finding that this testimony did not have the "effect of suggesting to the jury that Defendant simply followed the advice of counsel and should therefore not be held liable" (App. at A16). In view of the actual record, petitioners submit that there cannot be any other construction of this testimony than that it suggested (rather, specifically told) to the jury that the MCPRC members simply followed the advice of the County's legal counsel. There was no basis in

the record for the Sixth Circuit's conclusion that the County's defiance of the district court's order was not prejudicial and was harmless.

Moreover, although raised on appeal, the Sixth Circuit never considered the issue that the County also violated the district court's order granting petitioners' motion *in limine* "to the extent that it concerns precluding argument that Plaintiffs should receive no award because of an earlier award in a separate case." As the record shows, the County made this argument repeatedly without admonition by the district court despite the earlier ruling (*e.g.*, R.311, Tr. 4/29/08 at 115; R.314, Tr. 5/2/08 at 127, 130-31, 148, 151). It should have been unquestioned that testimony and argument about the size of the settlement petitioners years earlier had received in a separate case was highly prejudicial. *See, e.g.*, *United States v. Williams,* 568 F.2d 464 (5th Cir. 1978); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975).

Additionally, although raised on appeal, the Sixth Circuit never considered that the County should have been precluded under Fed. R. Civ. P. 37(c)(1) from offering into evidence anything relating to "advice of counsel" or the Fifth Third Bank documents or the testimony of corporation counsel witnesses because this evidence was intentionally withheld during discovery. Petitioners objected to the introduction of this evidence each time defendants offered it because the evidence had been intentionally withheld during discovery. Indeed, with respect to the Fifth Third Bank documents, petitioners continued making their objections to the

introduction of this evidence to the point that the district court finally stated, "Let's move on" and would not hear any further objections (R.313, Tr. 5/1/08 at 102). Contrary to the Sixth Circuit's decision, petitioners did provide the district court with a "history of correspondence" between the parties in their post-trial brief.

While the Sixth Circuit determined that admission of improper evidence will not warrant a new trial unless a different ruling would have caused a different outcome at trial, it did not consider whether a different outcome would have occurred had the district court excluded the disputed evidence based on the County's failure to disclose this evidence prior to trial, contrary to the mandate of Rule 37(c)(1).

This opinion thus is contrary to decisions of other federal circuit courts, which hold that exclusion of evidence under Rule 37(c)(1) is mandatory, absent justification. The Sixth Circuit itself ruled in a prior case that evidence not produced during discovery must be excluded pursuant to Rule 37(c)(1). *Dickenson v. Cardiac & Thoractic Surgery of Eastern Tenn.*, 388 F.3d 976, 983 (6th Cir. 2004). Other circuits have ruled likewise. *E.g.*, *Musser v. Gentive Health Svcs.*, 356 F.3d 751, 756 (7th Cir. 2004). Contrary to the Sixth Circuit's opinion, this challenged evidence related directly to the issues before the jury - whether the County acted with a constitutionally improper motive and whether Hillside was entitled to damages on the judgment in its favor on its breach of contract claim. There can be no basis (and the

opinion cites none) for the determination that this evidence was "merely tangential to the parties' claims and did not create the type of prejudice that would affect the outcome of the trial" (App. at A17), particularly in light of Rule 37(c)(1).

Accordingly, the decision below which determined that the district court's allowing the County to act with impunity in violating the district court's orders regarding motions *in limine* and its admission of evidence which the County had withheld from petitioners during discovery did not unfairly prejudice petitioners or, if it did constitute an abuse of discretion, was merely harmless error contradicts and conflicts with decisions of this Court and the other circuit courts (and even prior Sixth Circuit decisions). Only this Court can resolve this conflict between these decisions and the Sixth Circuit's ruling in the case at bar. Petitioners therefore respectfully request that this Court grant review in this case.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH AND CONTRADICTS DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS BY ADDING TO A PLAINTIFF'S BURDEN OF PROOF WHEN MAKING A SUBSTANTIVE DUE PROCESS CLAIM

Petitioners in this case alleged that the County had deprived them of their rights to substantive due process by actions which were arbitrary and capricious. On appeal, the Sixth

Circuit's opinion erroneously held that to show their substantive due process rights were violated, petitioners had to prove not only that the County acted arbitrarily and capriciously without a legitimate governmental interest, *but also* that the County acted out of a constitutionally impermissible motive (App. at A12).

By requiring that in a substantive due process case, a plaintiff must prove that a defendant acted with a constitutionally improper motive, the Sixth Circuit's decision contradicts the "fundamental rights and liberties" test which this Court adopted in *Washington v. Glucksberg*, 521 U.S. 702 (1997). It also conflicts with decisions of other circuit courts, such as the Second Circuit, *O'Mara v. Town of Wappinger*, 485 F.3d 639, 700 (2d Cir. 2007) (plaintiffs must show "(1) that they had a valid property interest in the certificate and (2) that the Town infringed that interest in an arbitrary or irrational manner"); *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 503 (2d. Cir. 2001), and the Fourth Circuit, *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) ("the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency") (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1618 (2006). Absent review, the Sixth Circuit will impermissible add an element to a substantive due process claim, causing this Court's decision and other federal circuit courts. Review by this Court will resolve the question of the required

elements which a plaintiff must prove in a substantive due process case.

Additionally, prior decisions of the Sixth Circuit held that official action which is improper on its face can establish a claim for deprivation of substantive due process rights. *Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008); *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000). In the case at bar, while in some instances the County acted out of a constitutionally improper motive, in other instances the County's official action was improper on its face. The Sixth Circuit erroneous failed to consider or review the actions of the County which were facially constitutionally improper, such as, for example, the action to "postpone" the decision on the request for assignment until the agreement between Hillside and the County could be reopened and renegotiated to Hillside's detriment.

As to the County's actions for which there was an improper motive, the Sixth Circuit's decision contradicts prior decisions of this Court and even the Sixth Circuit, that a *defendant* had the burden of showing that it would have taken the same action absent the improper motive. *Mt. Healthy City Bd. of Ed. v. Doyle*, 428 U.S. 274, 287 (1977); *Scarborough v. Morgan County Bd. of Ed.*, 470 F.3d 250, 262 (6th Cir. 2006). The Sixth Circuit's review and dismissal of the evidence in this case, if applied to any other case, would mean that no plaintiff could ever show that any defendant acted with an improper purpose. While the Sixth Circuit stated that "there was little evidence of improper motive" (App. at A13) without any citation to the record, review of the record

demonstrates that this statement is factually incorrect. The panel incorrectly describes the testimony of MCPRC President Perna as showing that only a "small consensus" of the commissioners acted improperly. But actually, as the record shows, Perna spoke to seven (of 10) commissioners about each commissioner's decision to vote to have the County keep revenues from parking "over and above [what] the contract" provided to the County in order to have leverage to extract concessions from Hillside because of the imminent closing date of the pending transaction between Hillside and PSE. It was only a "very small consensus" who did *not* act out of a constitutionally improper purpose, but who legitimately believed that the County was entitled to the disputed parking revenues, contrary to the characterization of the panel in the opinion. Likewise, although the opinion states that Commissioner DiMaria denied telling Hank Riberas (of Hillside) that he was taking away Hillside's share of the parking revenue solely to extract concessions from Hillside (App. at A13), the record shows instead that DiMaria actually testified that he *"may have"* made that statement (R.307, Tr. 4/23/08 at 144). Further, contrary to the finding in the opinion, the commissioners did not testify that they voted in favor of the motion because the Sublease Agreement was unclear. For example, Commissioners Slinde and Sauger testified that they relied on the advice of counsel (over petitioners' objections), Commissioner Salerno intimated that the reason was something which could not be discussed in an open forum, and Commissioner Raymus did not deny that the vote was motivated by the desire to get concessions from Hillside, and actually identified those concessions -

parking, advertising and security (R.312, Tr. 4/30/08 at 174; R.313, Tr. 5/1/08 at 73, 77, 125). Thus, the record makes clear that the only conclusion which could have been reached is that a majority of the commissioners acted with an improper purpose, contrary to the erroneous conclusion reached in the opinion. Yet the Sixth Circuit summarily disregarded this evidence, setting an unwarranted high level which a plaintiff must meet in order to show improper purpose. Absent review by this Court, plaintiffs will not be able to show sufficient evidence to demonstrate that defendants in a substantive due process case acted with improper purpose, vitiating the existence of this type of claim.

Since the decision below contradicts and conflicts with decisions by this Court and other federal circuit courts as to the burden of proof in cases alleging a claim of deprivation of substantive due process and the level of evidence necessary to show that a governmental defendant acted with improper purpose, review by this Court is warranted. Only this Court can resolve this conflict between these decisions and the Sixth Circuit's ruling in the case at bar. Petitioners therefore respectfully request that this Court grant review in this case.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH AND CONTRADICTS DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS REGARDING THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

Prior to trial, the district court granted the County's motion to exclude the testimony and report of petitioners' expert witness, Mark Crawford. Petitioners appealed this ruling on the grounds that the district court acted as a fact-finding in that ruling by weighing the credibility of the witness and making a determination based on the district court's not agreeing with the expert witness' conclusions. On appeal, the Sixth Circuit's opinion erroneously failed to apply the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc,* 509 U.S. 579 (1993), and *Kumho Tree Co. v. Carmichael*, 526 U.S. 137 (1999), to determine if there were any reasoning and methodology utilized in Crawford's report. Instead, as the opinion reflects, the Sixth Circuit instead acted as the trier of fact and weighed the evidence, which does not constitute a basis for sustaining a *Daubert* challenge. The Sixth Circuit's decision thus contradicts the decisions of this Court and other federal circuit courts, including prior decisions of the Sixth Circuit.

In *Daubert* and *Kumho*, this Court set forth the standard for admissibility of expert testimony under Fed. R. Evid. 702. This Court did not intend for the trial courts to act as a finder of fact as to the

credibility of the witness or the weight given to such testimony. Instead, as this Court stated in *Daubert*,

> vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the appropriate means of attacking shaky but admissible evidence. ... Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. R. Civ. P. 50(a), and likewise to grant summary judgment, Fed. R. Civ. P. 56. These conventional devices, rather than wholesale exclusion under an uncompromising general acceptance test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

509 U.S. at 596.

The Sixth Circuit has held in prior decisions that mere weaknesses in the factual basis of an expert witness' opinion bear on the weight of the evidence rather than on its admissibility. *E.g.*, *Nemir v. Mitsubishi Motor Sales of America, Inc.*, 6 Fed. Appx. 266 (6th Cir. 2001). These decisions accord with those of other circuit courts, such as the Second Circuit, *Campbell ex rel. Campbell v.*

Metropolitan Property and Cas. Ins. Co., 239 F.3d 179 (2d Cir. 2001), and the Ninth Circuit, *Sullivan v. U.S. Dep't of Navy*, 365 F.3d 827 (9th Cir. 2004).

The Sixth Circuit was recently presented with a case, like that case at bar, in which the district court likewise excluded expert witness testimony because the district court disagreed with the expert witness' assumptions. In *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469 (6th Cir. 2008), the district court had excluded an expert witness' testimony "for relying on assumptions that the district court found were unwarranted." *Id.* at 483. The Sixth Circuit reversed that ruling and remanded the case, finding that a reasonable jury might well choose to believe the expert witness and the circumstantial evidence on which his testimony was based, and that the district court abused its discretion in excluding this testimony. *Id.* But in the case at bar, the Sixth Circuit decline to reverse the district court's decision excluding Crawford's testimony because the district court disagreed with Crawford's assumptions and conclusions, not because Crawford was unqualified or used some unproven methodology to make his calculations. Thus, there is a conflict in decisions even within the Sixth Circuit. Absent review by this Court, that conflict with this Court's decisions, other circuit courts' decisions and even prior decisions of the Sixth Circuit will remain, causing a lack of uniformity in the application of this Court's rulings.

The Sixth Circuit also determined that if the exclusion of Crawford was erroneous, it was harmless error because the jury did not reach the issues of damages because it rejected petitioners'

breach of contract claim (App. at A21). This conclusion, however, is completely erroneous, as the record demonstrates that *petitioners* were granted judgment on their breach of contract claim. The jury did reach the issue of damages. The erroneous exclusion of petitioners' expert witness clearly affected the outcome reached by the jury and cannot be held to be harmless under any construction.

Thus, since the decision of the Sixth Circuit conflicts with this Court's decisions and that of other circuit courts, including prior decisions of the Sixth Circuit itself, review is warranted to ensure uniformity in rulings as to expert witness testimony. Petitioners therefore respectfully request that this Court grant review in this case.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH AND CONTRADICTS DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS REGARDING FED. R. CIV. P. 50 MOTIONS

In the case at bar, the district court refused to rule on petitioners' post-trial Fed. R. Civ. P. 50(b) motion for judgment as a matter of law, claiming that petitioners had failed to bring a motion for directed verdict pursuant to Rule 50(a) prior to the case being submitted to the jury. The Sixth Circuit affirmed this ruling.

Yet, the record reflected that petitioners did preserve their right to bring a motion for judgment as a matter of law by making a motion for directed verdict on the record during trial, and that it was the district court which prevented petitioners from fully developing that motion on the record. As the record demonstrated, after the County made its Rule 50(a) motion, the district court would not permit petitioners to argue their motion and left for the day. The following morning, as the first matter without permitting any argument whatsoever, the district court stated "First, all pending Rule 50 motions are going to be reserved. I will not grant or deny any" (R.314, Tr. 5/2/08 at 3). The language the district court used is telling - if only the County had made a pending Rule 50 motion and petitioners had not made any such motion, then why did the district court use the plural and speak of "all pending Rule 50 motions" instead of stating, "The County's Rule 50 motion is reserved"? The district court then directed *the parties* to file their Rule 50(a) motions as post-trial Rule 50(b) motions for judgment as a matter of law. The record thus belies the Sixth Circuit's opinion that petitioners failed to bring a Rule 50(a) motion.

The Sixth Circuit has previously has ruled that "technical deviation from the Rule 50(b) command is not fatal." *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 477 (6th Cir.), *cert. denied*, 498 U.S. 855 (1990). The application of Rule 50 in any case should be examined in the light of the accomplishment of a particular purpose as well as "the general context of securing a fair trial for all concerned in the quest for

truth." *Boynton v. TRW, Inc.*, 858 F.2d 1178, 1185 (6th Cir. 1988). Yet the Sixth Circuit declined to apply this precedent to the case at bar.

This case presents the same type of "unique circumstances" as this Court faced in *Thompson v. INS*, 375 U.S. 384 (1964). In that case, the petitioner had allowed an appeal deadline to pass in reliance on the court's assurance that his post-trial motion was timely. Citing the doctrine of "unique circumstances," this Court determined that the appellate court did not lack jurisdiction to hear the appeal, despite its untimeliness. Other federal circuit courts have likewise reviewed the concept of "unique circumstances" in circumstances such as the case at bar, arriving at results opposite to that reached by the Sixth Circuit here. *E.g., Watson v. Mann (In re Weston)*, 18 F.3d 860, 863 (10th Cir. 1994); *Estle v. Country Mut. Ins. Co.*, 970 F.2d 476, 478 (8th Cir. 1992).

The Sixth Circuit's opinion in this case never addressed in any way petitioners' submission that this case presents the type of "unique circumstances" as were presented in *Thompson v. INS*, *supra*, such that there should be an "estoppel" of sorts against the contention that petitioners failed to make a Rule 50(a) motion. Petitioners submit that not only was this erroneous, but that it conflicts with decisions of this Court and other circuits, and should be reviewed by this Court.

Further, the district court incorrectly determined that petitioners were required to bring a motion for directed verdict in a written form. As

Fed. R. Civ. P. 7(b)(1)(A) provides, motions must be in writing "unless made during a hearing or trial." Petitioners brought their motion during trial, thus obviating the need that this motion be submitted to the court in a written form. Yet the Sixth Circuit's decision never discusses this issue which was raised by petitioners on appeal, letting the district court's decision stand. By this action, the Sixth Circuit has abrogated Rule 7(b)(1)(A) without reason. Thus, absent review by this Court, parties who make oral Rule 50(a) motions during trial pursuant to Rule 7(b)(1)(A) will be precluded from bring Rule 50(b) motions because the Rule 50(a) motions were not in writing. As this decision runs contrary to the express language of the Federal Rules of Civil Procedure, petitioners submit that review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HILLSIDE PRODUCTIONS, INC., GARY RONCELLI, AND JOSEPH VICARI,

Plaintiffs-Appellants/Cross-Appellees,

v.

COUNTY OF MACOMB,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: KEITH, CLAY and GRIFFIN, Circuit Judges

DAMON J. KEITH, Circuit Judge. Plaintiffs-Appellants Hillside Productions, Inc., Gary Roncelli, and Joseph Vicari ("Plaintiffs") were granted

summary judgment on their breach of contract claim against Defendant-Appellee County of Macomb ("the County"). Following a jury trial, Plaintiffs were denied their remaining claims against the County and awarded no damages for their breach of contract claim against the County. The County prevailed on its counterclaims against Plaintiffs. On appeal, Plaintiffs argue that the district court erred by: (1) denying Plaintiffs' motion for judgment as a matter or law, or, in the alternative, for a new trial; (2) concluding that advice of counsel evidence was properly admitted at trial; (3) excluding the expert testimony of Mark Crawford; and (4) rejecting their procedural due process claims against the County. For the reasons set forth below, we **AFFIRM**.[1]

I. BACKGROUND

A. Facts

Sublease

On May 19, 1999, Plaintiffs and the County entered into a Sublease for Plaintiffs' exclusive use of the Freedom Hill Amphitheater ("Amphitheater") in Macomb County's Freedom Hill County Park ("Park") and shared use of the rest of the Park. On March 21, 2000, Plaintiffs and the County amended the Sublease and extended its term, with a twelve-year extension until 2020 and renewal options until 2040. Plaintiffs constructed underground improvements on the Amphitheater. The County did not reimburse Plaintiffs for the $1.3 million in costs associated with these improvements.

The County suggested that Plaintiffs instead recoup payment for these costs by taking 75% of the annual revenue from parking at all events at the Park with the County receiving the remaining 25%. Plaintiffs also had to guarantee a minimum of $125,000 annually to the County regardless of the actual revenue, in exchange for receiving 75% of the revenue. At the end of 2000, Plaintiffs began making major renovations to the Amphitheater and applied for a Class C liquor license from the City of Sterling Heights, Michigan. From October 24 through November 15, 2000, Sterling Heights sent letters to Macomb County Parks and Recreation Commission ("MCPRC"), demanding that revenues be directed to Sterling Heights to support services in the Park. Plaintiffs assert that the County never provided them with the notices; and as a result, Sterling Heights imposed a Special Approval Land Use requirement and a new building requirement on the Plaintiffs.

The County generally authorized its Parks Administrator, Anthony Casasanta, to sign Plaintiffs' requests for building permits and other documents for submission to Sterling Heights, including the February 9, 2001 Special Approval Land Use that he signed. After obtaining the Special Approval Land Use, Plaintiffs required a building permit to begin the second phase of the Amphitheater construction project, including constructing a stage that had been torn down during the first phase of the building project. Plaintiffs submitted the building permit request to Casanata for signature, but the County directed him not to sign the document.

Plaintiffs were advised that they would instead need the signature of John Hertel, Chairman of the County Board of Commissioners. Chairman Hertel and Corporation Counsel George Brumbaugh met with Plaintiffs, and James Perna, the then President of the MCPRC. Chairman Hertel advised Plaintiffs that they would have to make concessions to the Sublease in exchange for Hertel's signature on the building permit request. Plaintiffs submitted to this request in what became the Second Amendment to the Sublease, on March 29, 2001. The Second Amendment to the Sublease included cross-indemnification provisions for the parties and required Plaintiffs to pay maintenance, property taxes, and 1% of gross ticket revenues to the County.

Food and Beverage Agreement

Plaintiffs eventually entered into a Food and Beverage Agreement with the County for Independence Hall, a banquet facility located in the Park. In October 2000, the County issued a Request for Proposals for Catering Services at the Independence Hall, which stated: "No liquor license is available at the Independence Building. All alcohol consumption is done either by being provided by a host without charge or through use of a temporary permit secured by a non-profit entity." (Am. Compl. Ex. I, at 2.) Parks Administrator Casanata received a letter from the Sterling Heights Police Department in response to the Request for Proposals, dated October 26, 2000, advising him that Independence Hall must comply with the city's

liquor ordinances and providing him with the text of said ordinances.

Plaintiffs bid on the County's Request for Proposals and thereafter executed the Food and Beverage Agreement, a license, with the County on May 10, 2001. The license provided Plaintiffs with access to parts of the building for catering service through 2020, for an annual payment of $40,000. Plaintiffs and Sterling Heights became embroiled in litigation regarding the ordinances that Sterling Heights required of Plaintiffs, which ended after entry of a Consent Judgment in 2004. See *Hillside Productions, Inc. et al. v. Duchane et al.*, Case No. 2:02-cv-73618 (E.D.Mich.).

In January 2005, Plaintiffs sought the County's consent to renovate Independence Hall. Plaintiffs wanted to create office space, a coatroom, and a liquor storage room. The proposed coatroom would have affected the space in the County's meeting room, and resulted in changes to the County's administrative office and storage supply areas. The County responded by stating that the MCPRC would like to meet with Plaintiffs to discuss a possible modification to the Food and Beverage Agreement and the Sublease. Plaintiffs countered that they would not renegotiate either agreement to obtain the approval to renovate.

The MCPRC stated that it would approve Plaintiffs' request only if Plaintiffs agreed to collect parking revenue for all events-the County's obligation under the Second Amendment of the Sublease-at no charge, unless the revenue exceeded

$500,000, and at only 25% of the actual labor costs applied against any amount owed to the County above $125,000. Plaintiffs rejected this proposal.

Over Plaintiffs' opposition, the MCPRC voted on April 11, 2005:

> [T]o approve Plaintiffs' request to use the following 439 square floor areas, small office for a catering manager, storage room for the locked liquor and dry goods and conference room area for coatroom all changes for remodeling paid by Hillside Production. In lieu of this space, Plaintiffs will continue to collect parking and cost of labor for parking not to exceed 25 percent and will forward request to Facilities & Operation for recommendation.

(Appellant's App. at 66.) Plaintiffs argue that the designation of square footage for its proposed renovations was contrary to the license, which stated that it was not a lease for specific property. Plaintiffs asked the MCPRC to reconsider its vote. When it would not, Plaintiffs sent the County a notice of termination of the Food and Beverage Agreement on July 5, 2005.

PSE Transaction

On October 18, 2005, Plaintiffs approached the County about entering into a purchase asset agreement that would assign its interests in the Sublease to a business formed between Plaintiffs

and Palace Sports and Entertainment Hillside, which was named PSE Hillside ("PSE"). PSE agreed to purchase the Sublease from Plaintiffs for nine million dollars. PSE sought written authorization to make improvements to the Amphitheater, to expand parking and raise parking rates without County approval, and to obtain clarification on whether County approval was necessary for advertising. The purchase asset agreement required that certain deliverables be provided in order for the parties to close the agreement.

After the April 11, 2005 MCPRC meeting at which parking collection was discussed, some MCPRC members met with Plaintiffs. According to Riberas, two of the eleven commissioners, Bucci and DiMaria, stated that the County was going to collect and keep all parking revenue related to County-sponsored events. Riberas testified that Bucci and DiMaria informally told him that they knew that the County was not entitled to all the parking revenue for County-sponsored events, but they would vote in this manner to force Plaintiffs to make concessions to the contracts. Bucci and DiMaria later denied making such statements. At the March 23, 2006 MCPRC meeting, DiMaria moved that the County "collect all parking for County-sponsored events and fees," and the motion carried. (3/26/06 Meeting Minutes at 3.) On March 24, 2006, Plaintiffs wrote the County demanding rescission of the vote within four days. On March 28, 2006, the County invited Plaintiffs and PSE to discuss the Sublease at its April 6, 2006 MCPRC meeting. Plaintiffs did not attend the meeting. Plaintiffs instead filed this lawsuit on March 31, 2006.

Plaintiffs sent a letter to PSE stating that they would be unable to close the deal because they could not provide the deliverables, and the County voted to keep the parking revenue on March 31, 2006. PSE represented that it still believed that the purchase asset agreement was viable and expressed a desire to close. PSE has filed an arbitration proceeding, which is pending, requesting that the parties close the purchase asset agreement. As of the date of the filing of Plaintiffs' brief, the PSE transaction had not closed.

B. Procedural History

On March 31, 2006, Plaintiffs filed their complaint against the County in the United States District Court for the Eastern District of Michigan, alleging Equal Protection Clause and substantive and procedural due process violations, and breach of contract. On May 8, 2006, the County filed its counterclaims against Plaintiffs, alleging breach of contract, fraud, unjust enrichment, and breach of fiduciary duty. On February 7, 2007, Plaintiffs moved for partial summary judgment on their breach of contract claim arising from the County's failure to provide Plaintiffs with certain parking revenues, which was granted by the district court.

On June 14, 2007, the district court granted the County's motion for partial summary judgment, holding that the County was entitled to 25% of parking revenues, 1% of gross ticket sales, maintenance costs, and property taxes. On October 18, 2007, Plaintiffs filed a motion in limine for a

determination as to whether the County could withhold certain discovery on the basis of attorney-client privilege and still proffer an advice of counsel defense to assert that qualified immunity applies. The district court denied Plaintiffs' motion because the County represented that it did not intend to rely on an advice of counsel defense for any of Plaintiffs' claims; and no official was sued in his or her official capacity, thus qualified immunity was irrelevant to the lawsuit.

The parties filed cross-motions for summary judgment and cross-motions to exclude expert witnesses. The district court granted Plaintiffs' motion for summary judgment on their breach of contract claim as to the parking revenue, and on the fraud, unjust enrichment, and breach of fiduciary duty counterclaims against them. The district court granted the County's motion for summary judgment as to Plaintiffs' procedural due process and equal protection claims. It also granted the County's motion to exclude the testimony of Plaintiffs' expert witness, Mark Crawford, but denied Plaintiffs' motion to exclude the County's expert witness, Larry Chiagouris.

The district court heard argument on the motions in limine on April 8, 2008. It granted Plaintiffs' motion to preclude emotional appeals to the jurors as taxpayers and references to the County's financial condition "to the extent that it concerns the argument that the jury should grant no award because Defendant's current or expected financial condition." (April 9, 2008 Dist. Ct. Order at 2.) The district court further granted Plaintiffs'

motion to preclude any reference to a multimillion dollar settlement that Plaintiffs had obtained four years earlier in its lawsuit against Sterling Heights "to the extent that it concerns precluding the argument that Plaintiffs should receive no award because of an earlier award in a separate case." (Id. at 1-2.)

On April 29, 2008, the district court reversed its ruling on Plaintiffs' motion in limine concerning the settlement that they had received four years earlier and permitted the County to argue that plaintiffs should not receive an award because of that settlement. On May 5, 2008, the jury found in favor of the County on Plaintiffs' substantive due process claims and on Plaintiffs' breach of contract claims concerning the Food and Beverage Agreement. Plaintiffs were awarded nothing on their judgment for the County's breach of contract concerning the parking revenue. The jury found in favor of Plaintiffs' on the County's breach of contract counterclaims, except as to the counterclaims concerning gross revenue from ticket sales and the Food and Beverage Agreement. The County was awarded $21,931 on its counterclaim for one percent of the gross revenue from ticket sales and nothing on the Food and Beverage Agreement counterclaims.

The County filed a motion for judgment as a matter of law, and Plaintiffs filed a motion for judgment as a matter of law, or, in the alternative, for a new trial, on June 13, 2008. On August 28, 2008, the district court denied both motions.

Plaintiffs filed their timely appeal, and the County filed its cross-appeal thereafter.

II. ANALYSIS

A. Plaintiffs' Rule 59(a) Motion for a New Trial

This Court reviews the denial of a party's motion for a new trial brought pursuant to Fed. R. Civ. P. 59 for an abuse of discretion. *See David v. Jellico Community Hospital, Inc.*, 912 F2.d 129, 132-33 (6th Cir. 1990). "An abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *See Mike's Train House, Inc. v. Lionel LLC*, 472 F.3d 398, 405 (6th Cir. 2006) (citations omitted). A court "may grant a new trial under Rule 59 if the verdict is against the weight of the evidence, if the damages award is excessive, or if the trial was influenced by prejudice or bias, or otherwise unfair to the moving party." *Rush v. Illinois Century Railroad Co.*, 399 F.3d 705, 727 (6th Cir. 2005).

Plaintiffs filed a motion for a new trial on June 13, 2008, arguing that the weight of the evidence did not support the jury's findings that: (1) the County was entitled to $21,930 as 1% of gross ticket sales revenue; (2) the County did not violate Plaintiffs' substantive due process rights; (3) Plaintiffs were entitled to no damages for the County's breach of contract concerning the collection of parking revenue; and (4) the County did not breach the Food and Beverage Agreement. Plaintiffs further argued that they were entitled to a new trial

as the "jury's verdict was improperly influenced or otherwise unfair" because: (1) advice of counsel evidence was admitted; (2) Fifth Third Bank documents were improperly admitted; and (3) defense counsel acted inappropriately during trial. Finally, Plaintiffs argue that a new trial was necessary because the award of $21,930 in damages was excessive.

The district court did not consider several claims in Plaintiffs' Rule 59 motion for new trial, finding that there was a "procedural bar" on Plaintiffs' Rule 59 motion because Plaintiffs had not properly brought a Rule 50(a) motion for a new trial prior to filing their Rule 59 motion. However, "motions for directed verdict and judgment n.o.v. are not prerequisites to a motion for a new trial." *TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981) (citation omitted). In *Southern Railway Co. v. Miller,* 285 F.2d 202, 206 (6th Cir. 1960), this Court considered a Rule 59 motion, which asserted that the verdict was against the weight of the evidence, in the absence of a Rule 50 motion and set forth a standard of review for Rule 59 motions (abuse of discretion) which is different from that for Rule 50 motions (de novo review). In their brief to the district court, Plaintiffs repeatedly argued that a new trial was necessary because the jury verdict was against the "weight of the evidence." (See R. 261, Pls.' Mot. for J. at 4, 7, 26, 27, 31-37.)

Despite this, the district court held:

> The procedural bar against Plaintiffs' Rule 50 motion extends to preclude any Rule 59 motion raising insufficient evidence for the jury's verdict grounds for relief. See, e.g. *ICP* [sic] *Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 545 n. 2 (6th Cir. 1981) ("A motion for judgment [NOV] cannot be entertained unless the moving party has made a timely motion for directed verdict at the close of all evidence."); *Southern Railway Co. v. Miller,* 286 F.2d 202, 206 (6th Cir. 1960) ("No motion for directed verdict having been made, the question of the sufficiency of the evidence to support the jury's verdict is not available as a ground for a motion for a new trial."). Accordingly, Plaintiffs may not seek new trial on the grounds that the jury had insufficient evidence for its verdict (1) awarding $21,930 to Defendant for 1% of gross ticket sales revenue, (2) finding that Defendant did not violate Plaintiffs' substantive due process rights, (3) awarding zero dollars to Plaintiffs for Defendant's breach of contract involving parking revenue, and (4) finding that Defendant did not breach the food and beverage agreement.

(August 28, 2008 Dist. Ct. Order at 10.)

The district court misapplied this Court's holdings in *Southern Railway* and *TCP Industries,*

Inc. In those cases, this Court distinguished between motions made pursuant to Rule 50, which claim there is insufficient evidence to send a case to a jury, and Rule 59 motions, which claim that the jury verdict was against the weight of the evidence. The County argues that Plaintiffs' motion was unclear as to whether it was based on the insufficiency of the evidence or the weight of the evidence, and that Plaintiffs invited ambiguity. However, Plaintiffs made repeated reference to the "weight of the evidence," and it was clear that they were not making an insufficiency of the evidence argument.

An abuse of discretion occurs when the district court improperly applies the law, uses an erroneous legal standard, or relies on clearly erroneous factual findings. *See Mike's Train House, Inc.*, 472 F.3d at 405. The district court abused its discretion when it misapplied the law and held that a Rule 50 motion is a prerequisite for a Rule 59 motion that the weight of the evidence does not support the jury's verdict. Nonetheless, Plaintiffs are not entitled to a new trial because their claims are meritless.

1. *Verdict Against the Weight of the Evidence*

A new trial is appropriate "only when a jury has reached a seriously erroneous result." *Id.* (internal quotations and citations omitted). Plaintiffs first claim that the jury award of $21,931 for Plaintiffs' failure to pay gross ticket sales to the County was excessive and request remittitur or a

new trial. Remittitur is granted only if the award exceeds the amount that a jury could reasonably find to be compensatory for the claimant's loss. *See Jackson v. City of Cookville*, 31 F.3d 1354, 1358 (6th Cir. 1994). The Sublease provides that Hillside "shall pay to the County 1% of all gross revenue derived from ticket sales" and that "gross ticket revenue derived from ticket sales shall be based upon general admission ticket price for each seat." (Sublease at 3, ¶ 3.) The testimony of Ticketmaster representative Robert Garsh and Plaintiffs' accountant, Thomas Wickersham, and the Ticketmaster Audit Reports indicate that Plaintiffs gave away a substantial number of complimentary tickets and failed to compensate the County for these tickets. The Audit Reports indicate that Hillside gave away $2,193,179 in tickets. The jury awarded the County damages that were 1% of that amount-$21,931. This sum was not excessive and was reasonable in light of the evidence regarding the gross ticket revenue at issue.

Plaintiffs further argue that the district court abused its discretion when it failed to put aside the jury's verdict against Plaintiffs' on their substantive due process claim concerning the County's vote on the collection of the parking revenue. A court is not to set aside a verdict simply because it believes that another outcome is more justified. *See Denhof v. Grand Rapids,* 494 F.3d 534, 543 (6th Cir. 2007) (citing *TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981)). To show that their substantive due process rights were violated, Plaintiffs must prove that the County acted in a manner that was "arbitrary or capricious," *Bowers*

v. City of Flint, 325 F.3d 758, 763 (6th Cir. 2003), and that the County acted out of a constitutionally impermissible motive, *Scarborough v. Morgan County Board of Education,* 470 F.3d 250, 261 (6th Cir. 2006).

At trial, there was little evidence of improper motive. Former MCPRC President Perna did not vote in favor of the motion. Eight of the remaining ten commissioners testified that they voted in favor of the motion because they believed that the Sublease was unclear, and that they did not intend to injure Hillside or extract concessions. The primary evidence of improper motive was presented through Riberas's testimony. Riberas claimed that Commissioners Bucci and DiMaria told him that they did not believe that the County was entitled to parking revenue and that they were seeking to extract concessions from Plaintiffs. DiMaria and Bucci both denied making such statements. MCPRC President Perna testified that he spoke to six commissioners, and a "small consensus" of the commissioners believed that the County was entitled to the money. The jury properly made a credibility determination concerning what evidence to rely upon, and a rational factfinder could find that there was no impermissible motive given these conflicting facts. The district court was not required to ensure that the jury reach the most justifiable outcome-it was to determine whether any rational fact-finder could reach the conclusion that the County did not act out of an impermissible motive. *See Denhof v. Grand Rapids,* 494 F.3d 534, 543 (6th Cir. 2007). The facts here support a conclusion that there was no improper motive.

Plaintiffs next contest the jury's award of no damages on their breach of contract claim with respect to the parking revenue. The district court granted Plaintiffs' motion for summary judgment and held that the County's March 23, 2006 vote to retain parking revenue violated the terms of the Sublease and left the issue of the damages award for the jury. Under Michigan law, the party asserting a breach has the burden of proving damages with reasonable certainty. *See Alan Custom Homes, Inc. v. Krol,* 256 Mich.App. 505, 667 N.W.2d 379 (Mich.App.2003). Plaintiffs did not introduce evidence of lost parking revenue. And, despite the amount of parking revenue collected, the County was entitled to a guaranteed minimum of $125,000 annually. After the 2006 vote, the County never received more than its guaranteed $125,000. Accordingly, the vote did not cause any direct damages to Plaintiffs. As for consequential damages, a PSE representative acknowledged that the parking revenue from County-sponsored events was not a significant part of the transaction with Plaintiffs. This evidence adequately supports the jury's determination that Plaintiffs did not incur damages as a result of the parking vote.

Plaintiffs also contest the jury's finding that the County did not breach the Food and Beverage Agreement by "refusing to allow improvements," and that Plaintiffs did breach the Agreement by failing to make payments on the contract although this breach resulted in no damages to the County. The Agreement provides that Plaintiffs will have access to Independence Hall to conduct events

"except for the Park administrative office and storage supply areas ." (Agreement at 8.) Plaintiffs sought to make permanent changes to the administrative and storage areas of the Park. Consequently, the County's request for additional consideration to make renovations to these areas was not unreasonable, and a reasonable juror could find that no breach occurred. The Agreement permits unilateral termination only upon breach, and the jury reasonably found that the County did not breach its contract by denying Plaintiffs' request to make permanent changes to the venue. Accordingly, by failing to make payment pursuant to the Agreement upon declaration of the contract's termination, Plaintiffs themselves had breached the contract.

2. *Unfair or Improperly Influenced Verdict*

Plaintiffs next argue that the district court abused its discretion when it held that the jury's verdict was not improperly influenced or otherwise unfair due to the admission of evidence concerning advice of counsel and the Fifth Third Bank documents, and the improper conduct of defense counsel. Evidentiary rulings fall within the broad discretion of the district court, *Conklin v. Lovely,* 834 F.2d 543, 551 (6th Cir. 1987), and a new trial is proper only when an abuse of discretion has an effect on the final result, *Leonard v. Uniroyal, Inc.*, 765 F.2d 560, 567 (6th Cir. 1985).

As the district court noted, the challenged evidence[2] - the advice of counsel evidence and the

Fifth Third Bank evidence - constituted "a small portion of a nearly month-long trial and did not relate to an actual defense." (August 28, 2008 Dist. Ct. Order at 13.) It held that this evidence did not have a substantial effect on the final result of the trial. The district court denied Plaintiffs' motion *in limine* concerning the advice of counsel evidence, "finding that Defendant would not rely on advice as counsel as an affirmative defense and that the such evidence was therefore not relevant to any fact of consequence in the case." (*Id.*) After trial, the district court held that the County "in fact presented no such defense at trial." (*Id.*) It noted that while "certain witnesses touched upon advice of counsel, it [sic] did so in a tangential way and not with the effect of suggesting to the jury that Defendant simply followed the advice of counsel and should therefore not be held liable." (*Id.*) With regard to the Fifth Third Bank documents the court noted that Plaintiffs did not object to this evidence at trial, and held that it was not convinced that these documents were "surprise" evidence. With respect to the alleged misconduct of counsel, the district court noted that "Plaintiffs raise isolated moments in a lengthy trial." (*Id.* at 14.)

The district court correctly found that there was no unfair prejudice resulting from the admission of the challenged evidence at trial or the conduct of counsel at trial. Much of the testimony that Plaintiffs describes as "advice of counsel" evidence was elicited by Plaintiffs. There were adequate jury instructions, no advice of counsel defense presented at trial, no timely objections to the admission of the contested evidence, and the

contested evidence was merely a small portion of the evidence presented at trial and was not prejudicial. When a new trial is requested on the basis of counsel's conduct, there must be clear prejudice that would justify a new trial. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1939). The alleged misconduct drew no timely objections. The district court instructed the jury not to consider the arguments of counsel as evidence (Jury Instruction 4-5), and courts must presume that juries follow instructions. *See Francis v. Franklin,* 471 U.S. 307, 324 n. 9 (1985). Plaintiffs have failed to show that there has been an abuse of discretion that had a substantial effect on the outcome of the trial. *See Conklin*, 834 F.2d at 551.

Moreover, even if the admission of the challenged evidence was an abuse of discretion, it was harmless error. Admission of improper evidence at trial will not warrant a new trial unless a different ruling would have caused a different outcome at trial. *See Morales v. American Honda Motor Co.*, 151 F.3d 500, 514 (6th Cir. 1998). The challenged evidence relates to issues that were merely tangential to the parties claims and did not create the type of prejudice that would affect the outcome of the trial.

Accordingly, the district court's rulings on these issues and the jury's verdict are **AFFIRMED**.

B. Plaintiffs' Motion for Judgment As a Matter of Law

The district court denied Plaintiffs' motion for judgment as a matter of law, finding that Plaintiffs failed to bring a Rule 50 motion for judgment as a matter of law before the case was submitted to the jury. We review a district court's denial of a motion for judgment as a matter of law de novo. *See Greene v. B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784, 788 (6th Cir. 2005). A court may grant a motion for a judgment as a matter of law if " 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue....' " *Mike's Train House*, 472 F.3d 398, 405 (6th Cir. 2006) (quoting Fed. R. Civ. P. 50(a)(1)). Judgment as a matter of law is appropriate when "viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Noble v. Brinker International, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004).

Courts may grant a party's motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue...." Fed. R. Civ. P. 50(a)(1). A motion for judgment as a matter of law must "be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(1)(2); *see American and Foreign Insurance Co. v. Bolt,* 106 F.3d 155, 160. "A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." *American and Foreign*

Insurance Co., 106 F.3d at 160 (quoting Advisory Committee Note, Fed. R. Civ. P. 50 (1991)).

Plaintiffs claim that they were prohibited from elaborating on their Rule 50 motion; however, the record indicates otherwise. At trial before the jury recessed, counsel for Plaintiffs stated, "I'd like to reserve my Rule 50 motion for later so we can keep proceeding on." (5/1/2009 Tr. at 127.) The court indicated that "you've successfully preserved that position." (*Id.*) After the jury recessed, the parties had oral argument on the County's pending Rule 50 motions and several other matters. (*Id.* at 128-205.) During these arguments, although the court noted that Plaintiffs' counsel mentioned that she wanted to elaborate on Plaintiffs' Rule 50 claims, Plaintiffs' counsel never did so.

Counsel discussed Defendant's Rule 50 motions during oral argument. Plaintiffs responded to the County's Rule 50 motions by seeking a jury determination on the issues. The morning following this oral argument, the court announced its decision to reserve the pending Rule 50 motions and return to them after the jury deliberated. Plaintiffs did not object to this, and Plaintiffs never made a Rule 50 motion on the record before the jury verdict was rendered. Plaintiffs never provided the factual or legal basis for their entitlement to relief under Rule 50.

Plaintiffs may not now rely upon their general statement that they reserved their right to make a Rule 50 motion. A Rule 50 motion "must specify the judgment sought and the law and facts

that entitle the movant to the judgment." Fed. R. Civ. P. 50(1)(2). The record is clear that Plaintiffs never made a motion on the record before the verdict was rendered. The arguments were centered on the County's Rule 50 motions, and Plaintiffs never raised any issues or provided a basis for why they were entitled to relief under Rule 50. In fact, Plaintiffs argued in favor of a jury determination on many of the issues. Their failure to raise their claims was more than a minor technical error-they simply never made the motion. Rule 50 is meant to "narrowly restrict the grounds used to overturn a jury verdict by requiring that parties raises important issues before the case is submitted to the jury." *American and Foreign Insurance Co. v. Bolt*, 106 F.3d 155, 160. Accordingly, the district court properly held that Plaintiffs did not make a Rule 50 motion and its determination on this issue is **AFFIRMED**.

C. Exclusion of Plaintiffs' Expert Testimony

When considering the admissibility of proffered expert testimony, trial courts are given "the task of ensuring that an expert's testimony both rests on reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993). The trial court is afforded "a relatively wide degree of discretion" in determining whether to admit expert testimony. See *United States v. Paris*, 243 F.3d 286, 288 (6th Cir. 2001) (internal citations and quotations omitted). The party proffering the evidence bears the burden of proving its admissibility. *See Nelson v. Tennessee Gas Pipeline*

Co., 243 F.3d 244, 251 (6th Cir. 2001). A "party proffering expert testimony must show by a 'preponderance of proof that the expert whose testimony is being offered is qualified and will testify to scientific knowledge that will assist the trier of fact in understanding and disposing of issues relevant to the case." *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) (citing *Daubert,* 509 U.S. at 592 n. 10).

Plaintiffs' expert, Mark Crawford, is a certified public accountant, and his testimony was intended to establish the damages stemming from the County's alleged breach of contract. The district court excluded the expert testimony and found that "Crawford's report is heavy on argumentative narrative and short on verification for his figures." (February 15, 2008 Dist. Ct. Order at 3.) This finding was not an abuse of discretion given the content of the report.

The district court noted that Mark Crawford's report is nineteen pages long, and six of those pages provide background on the case. The court found that the report tends to repeat the claims in the complaint and does not provide much independent specialized analysis. And, the analysis that it does provide relies on questionable methodology. As the district court noted, the "most glaring example of unsubstantiated conclusion" was Crawford's projection that the projected loss should be based on the total purchase of the transaction "without offsetting the value of the asset that Plaintiffs retained when the transaction fell through." (February 15, 2008 Dist. Ct. Order at 5.) Plaintiffs

argue that this methodology was not improper because "there were no willing purchasers after the transaction ... failed to close." (Appellants' Br. at 68.) However, there is evidence on record that PSE is still willing to enter a contract with Plaintiffs. Furthermore, the expected profits analysis in the report does not have a sufficient basis in the facts or reliable methodology. Crawford projected an over $2 million loss in 2006 although Plaintiffs did not make a profit prior to 2006. When asked about the basis of one of his assumptions at reaching this figure, he stated that he pulled it "right out of my head." (Id. at 5.) Given these serious methodological issues in his analysis, the district court did not abuse its wide discretion in excluding Crawford's report.

Moreover, even if the exclusion of Crawford's testimony was erroneous, it was a harmless error. The jury never reached the issue of damages because it rejected Plaintiffs' claims that the County committed a breach of contract. *See Toth v. Grand Trunk Railroad,* 306 F.3d 335, 355 (6th Cir. 2002) (finding the exclusion of damages testimony harmless error where the jury found that the plaintiff failed to prove the claim at issue). For the foregoing reasons, the district court exclusion of Crawford's testimony is **AFFIRMED**.

D. Plaintiffs' Procedural Due Process Claims

Plaintiffs argue that the district court improperly granted summary judgment against them on their procedural due process claims. This Court reviews a district court's grant of summary

judgment de novo. *See Spencer v. Bouchard,* 449 F.3d 721, 727 (6th Cir. 2006). Summary judgment is only appropriate where there is no genuine issue of material fact. Fed. R. Civ. 56(c). All reasonable inferences are drawn in favor of the non-moving party. *See Siggers-El v. Barlow,* 412 F.3d 693, 699 (6th Cir. 2005). Plaintiffs must show that they had a constitutionally protected property interest, suffered a deprivation of this protected interest, and that the County did not provide adequate procedural rights prior to the deprivation to prevail on a procedural due process claim. *See Med Corp., Inc. City of Lima,* 296 F.3d 404, 409 (6th Cir. 2002). Plaintiffs argue that "MCPRC's improper vote to keep all parking revenue from non-Hillside-sponsored events was done without affording plaintiffs proper notice or an opportunity to be heard, and was an act that in and of itself inflicted an immediate injury on plaintiffs." (Appellants' Br. at 65.) The district court rejected this argument and noted that the deprivation would not occur until parking revenue had been collected, divided, and paid; Plaintiffs had the opportunity to challenge the vote before it went into effect; and the County had proposed a meeting on the issue a few days after Plaintiffs objected to the vote. The MCPRC vote could have been rescinded after such meeting.

Plaintiffs cite *Nasierowski Brothers Inventory Co. v. Sterling Heights,* 949 F.2d 890 (6th Cir. 1991), to support their claim that they suffered an immediate injury after the Board made its decision to keep all parking revenue. In *Nasierowski,* the city passed a zoning ordinance, without notice or an opportunity to be heard, that

severely limited plaintiff's ability to use his land and resulted in immediate injury. *Id.* However, that case is clearly distinguishable from the current matter. Unlike the plaintiff in that case, who would be "placed in a position where he would be required to expend considerable time, effort, and money to restore the status quo ante," see *id.*, Plaintiffs would have incurred no injury until after the parking revenues were collected. The MCPRC's decision did not change the nature of the property or the nature of the type of activities that could occur there. Plaintiffs had ample opportunity to be heard during the County's proposed meeting and were given adequate notice of the County's decision. There were no genuine issues of material fact concerning the adequacy of procedural due process that the County provided Plaintiffs. Accordingly, the district court determination on this issue is **AFFIRMED**.

III. CONCLUSION

For the foregoing reasons, the district court's rulings and the jury's verdict are **AFFIRMED**.

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[1]The County's cross-appeal presented alternative claims in the event this Court reversed the district court's findings and ordered a new trial. We dismiss these claims because we affirm the jury's verdict.

[2]Plaintiffs also challenge the admission of testimony by two individuals, Brumbaugh and Meyerand. The district court properly held that Plaintiffs waived this issue by failing to provide adequate briefing on it in their motion for judgment as a matter of law.

Morever, as the County notes, "Although plaintiffs' counsel asserted at trial that these witnesses had not been produced for deposition, plaintiffs' counsel subsequently withdrew her objection, stating that counsel 'let him testify and then I can bring in the history of correspondence between us if necessary.'" (Appellee's Br. at 41.) No correspondence was provided, and no curative jury instruction was requested.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HILLSIDE PRODUCTIONS, INC., GARY RONCELLI and JOSEPH VICARI,

Plaintiffs/Counter-Defendants,

v. Case No. 06-11566

COUNTY OF MACOMB

Defendant/Counter-Plaintiff.

OPINION AND ORDER DENYING "DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW" AND DENYING PLAINTIFFS' "MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR NEW TRIAL"

Pending before the court are the above-captioned, post-verdict motions. The matter has been fully briefed and the court concludes that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will deny both motions.

I. BACKGROUND

Plaintiffs Hillside Productions, Inc. ("Hillside"), Gary Roncelli and Joseph Vicari filed this action on March 31, 2006, raising various federal and state claims against Defendant County

of Macomb related to Plaintiffs' operation of the Freedom Hill Amphitheater. In addition to more ordinary commercial claims alleging various breaches of contract, Plaintiffs also brought constitutional claims, which were limited after motion practice to a claim via 42 U.S.C. § 1983 of deprivation of substantive due process. The court previously ruled that Defendant breached the contract with respect to Hillside's share of parking revenues and that further motion practice or a trial would determine damages. (3/26/07 Order at 4-6.)[1] Defendant, meanwhile, brought counterclaims that sounded mainly in contract.

The case proceeded to trial by jury, which commenced on April 9, 2008 and lasted nearly a month until the jury rendered a verdict on May 5, 2008. The jury found (1) no deprivation of due process, (2) zero damages for Hillside for Defendant's breach of contract involving parking revenues, (3) $21,931 for Defendant for Hillside's breach as to payment of 1% of gross ticket revenue and (4) zero damages for Defendant for Hillside's breach of the Agreement for Food and Beverage Service and (5) no cause of action for Plaintiffs and Defendants' remaining claims and counterclaims. (See 5/5/08 Verdict Form.) The instant motions challenge certain aspects of the outcome and the conduct of trial.

II. STANDARD

Judgment as a matter of law is appropriate when "viewing the evidence in the light most favorable to the non-moving party, there is no

genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Tisdale v. Federal Exp. Corp.*, 415 F.3d 516, 527 (6th Cir. 2005) (quoting *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004) (internal quotation omitted)). The district court may not weigh the evidence or credibility, which are functions of the jury. *Jackson v. Quanex Corp.*, 191 F.3d 647, 657 (6th Cir. 1999). Denial of a motion for a new trial is reviewed for an abuse of discretion. *United States, ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 450 (6th Cir. 2005). Where the motion for a new trial is on the grounds that the jury verdict was against the clear weight of the evidence, the Sixth Circuit has explained that:

> A court may set aside a verdict and grant a new trial when it is of the opinion that the verdict is against the clear weight of the evidence; however, new trials are not to be granted on the grounds that the verdict was against the weight of the evidence unless that verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper.

Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 820-21 (6th Cir. 2000) (internal quotations omitted).

III. DISCUSSION

A. Defendant's Motion

Defendant's motion is directed solely at the jury's determination that Defendant failed to prove by a preponderance of the evidence that Hillside materially breached its agreement with Defendant with respect to sharing parking revenue. (5/5/08 Verdict Form at 11.) Defendant argues that its agreement is enforceable as a matter of law "and that if and where Plaintiffs performed any parking collection activity, Plaintiffs must set aside one-quarter of the parking revenue for Defendant." (Def.'s Br. at 2.) Defendant claims that the undisputed evidence at trial is that Hillside charged a flat rate for various high school graduation ceremonies at the Amphitheater and that no parking fees were charged. (*Id.*) It further claims that Hank Riberas made a statement against interest when he stated that these actions "probably" amounted to a breach of contract. (*Id.* citing 4/16/08 Tr. at 124-32.)[2]

Plaintiffs' response is more persuasive. A stray "probably" - which was in response to a hypothetical question and about to be qualified by a "however" before Defendant's counsel interrupted the witness, (4/15/08 Tr. at 132) - does not qualify as a statement against interest that would in effect require a rational jury to award damages to Defendant. Further, the jury was free to credit the testimony of witnesses supporting Plaintiffs' position. Tom Bommarito, Hillside's director of community relations, stated that Defendant was in

favor of the Amphitheater hosting such events. (4/29/08 Tr. at 142.) Thomas Bommarito averred that Defendant approved Hillside hosting such graduations without charging for parking. (4/30/08 Tr. at 56.) In addition, Defendant made no effort in its brief, or during the course of trial, to indicate what portion of the flat graduation ceremony fees would fairly amount to recoverable parking revenue to which Defendant was entitled to a one-quarter share. Faced with silence on the matter, a jury could rationally conclude that no parking revenue was involved and thus there could be no breach with respect to parking revenue. Under the circumstances, a rational jury could have found that Plaintiffs did not breach the agreement with respect to parking revenues and the court will therefore deny Defendant's motion.

B. Plaintiffs' Motion

1. Defendant's Procedural Challenge

a. Timeliness

A motion under Federal Rule of Civil Procedure must be filed no later than ten days after entry of judgment. Fed. R. Civ. P. 50(b) Defendant argues that Plaintiffs missed this deadline by one minute because the notice of electronic filing for Plaintiffs' motion "shows that Plaintiff's [motion] was filed at midnight, 12:00 a.m." (Def.'s Resp. at 1 (citing Notice of Electronic Filing, Def.'s Ex. A).) This argument comes close to frivolous. The very same exhibit actually states that Plaintiff's counsel entered the transaction "on 6/14/08 at 0:00 EDT"

and that the motion was "*filed* on 6/13/08." (Notice of Electronic Filing, Def.'s Ex. A (emphasis added).) Further, the court's docket sheet plainly indicates that Plaintiff's motion [Dkt. # 161] is dated 6/13/08 and the same date appears prominently on the electronic case filing system's identifying header that appears at the top of each page of Plaintiff's motion. There is thus no merit whatsoever in Defendant's argument concerning timeliness. The court rejects this request to strike Plaintiff's motion from the record.

b. Failure to Raise Arguments

Rule 50 limits renewed motions for judgment as a matter of law to issues that were previously raised. Fed. R. Civ. P. 50(b); *see also American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 159-60 (holding that district court could not *sua sponte* raise a new issue that Rule 50 would not allow a party itself to raise for the first time). "In short, JNOV is not available at anyone's request on an issue not brought before the court prior to submission of the case to the jury." *Bolt*, 106 F.3d at 160. "A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Advisory Committee Note to Rule 50(b) (1991) (citing *Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d Cir. 1989); *see also* Advisory Committee Note (2006) ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion.").

Defendant argues that Plaintiff reserved the right to raise such motions but in fact failed to raise any such motions and instead merely responded to Defendant's Rule 50 motions. (Def.'s Br. at 26.) Plaintiff disagrees and cites the trial transcript for the proposition that the jury recessed and "counsel for both sides argued their respective Rule 50 Motions." (Pls.' Reply Br. at 2 (citing 5/2/08 Tr. at 128-205, Pls.' Ex. 1).) Plaintiffs claim that the court acknowledged their Rule 50 motion on the constitutional claim and that the court had to recess proceedings before counsel could make any additional arguments. (Pls.' Reply Br. at 2.)

It cannot be disputed that Plaintiffs filed no written Rule 50 motions, as the court's docket indicates that no such pleadings were ever filed.[3] The court is therefore left to examine the transcript to determine whether Plaintiffs made an oral Rule 50 motion. Plaintiffs reserved the right to make such motions. The court had the following colloquy with Ms. Victor, Plaintiffs' counsel, and Mr. Addis, Defendant's counsel:

> Ms. Victor: Yes, Your Honor. Before I make this statement, I wish to reserve after Mr. Addis has rested the necessary things that lawyers do when one side rests or the others with relation to motions.
>
> Court: Rule 50 motions.
>
> Ms. Victor: Correct. I'd like to reserve my Rule 50 motion for later so we can keep proceeding on.

Court: Is that acceptable with you, Mr. Addis, that that can be elaborated upon when the jury is recessed?

Mr. Addis: By both parties?

Court: Well, yes, both parties. You both have an equivalent position, I think, under Rule 50.

Ms. Victor: I just have to make it at this time.

Court: Understood. I think you've successfully preserved that position.

Ms. Victor: Thank you, Your Honor. And then with respect to that, Your Honor, we have no rebuttal and we rest.

(5/1/08 Tr. at 127-28, Pls.' Reply Br., Ex. 1.)

There is a distinction between reserving and actually exercising a procedural right. Plaintiff's expressed intent to bring a Rule 50 motion does not necessarily mean that Plaintiff in fact moved for Rule 50 relief. The court's review of the transcript indicates that the oral argument Plaintiffs presented to the court was exclusively addressed in response to Defendant's duly filed motions for judgment as a matter of law.

The court excused the jury for the day and stated that it would work hard to ready the case for closing arguments and jury instructions the following morning. (*Id.* at 129-31.) After the jury was excused, the court remarked that "Ms. Victor said she wants to elaborate to some extent on her Rule 50 opportunity." (*Id.* at 131.) The court then stated, "I focus here upon the motions that have

already been filed by defendants." (*Id.*) The initial discussion and argument centered upon whether Vicari and Roncelli, the individual Plaintiffs, should be dismissed from the case. (*Id.* at 131-144.)

The discussion then turned to whether Defendant's Rule 50 motion should be granted with respect to dismissing Plaintiffs' constitutional claim. (*Id.* at 145.) Defendant presented its argument for why the constitutional claim should not go to the jury, focusing upon the evidence regarding the key March 23, 2006 vote of the MCPRC. (*Id.* at 146-156.) Then Plaintiffs' counsel presented a contrary argument, answering the court's questions about the nature and content of the testimony Plaintiffs relied upon to show a question of fact with respect to the constitutional claim. (*Id.* at 156-169.) The court expressed its provisional view that no evidence supported Plaintiffs' constitutional claim and that Defendant's motion should be granted:

> [D]epending on the facts of that case there certainly is the academic possibility that such evidence will emerge. I mean, if the evidence exists then my conclusion in this case is, I'm pointing toward this conclusion, that the evidence in this case simply doesn't exist, that you don't, that you don't have it.
>
> There aren't any board members who have been, who have either admitted to an acknowledgment of the situation, like that it's [Plaintiffs'] property, we

know, and we're going to take it anyway . . . there's nothing attributed to these people that runs in that direction.

There's scant evidence that would be inferential, in other words, that circumstances would point in that direction. It's very clear that there was a difference of opinion amongst the board members . . . . There was certainly a difference of opinion about how this contract should be interpreted with respect to the parking. There's no doubt about that. There's no doubt that the vote was aimed at, let us say, bringing that issue to a head, at least that.

But beyond that is your challenge for plaintiffs . . . [T]he evidence needs to support a jury being able to go beyond that point of disagreement, that may be in the realm of good faith or it might be a little beyond the realm of reasonable interpretation.

. . .

Negligence in the execution of public duties is not unconstitutional. It's unfortunate. We certainly hope it would happen less. But it happens all the time without violating people's constitutional rights. What you need to

> point to, I think, in this regard, is evidence from which a reasonable jury could say that a sufficient number of these board members acted with the intention to deprive Hillside wrongfully the property to which they were entitled beyond a mere plausible interpretation of contract obligations and so forth.
>
> Beyond that point and off into the realm of abuse of governmental authority, targeting a vulnerable contractual partner to try to make a power grab, a property grab, at an opportune time.
>
> If there's evidence pointing to knowledge and intention to act on that knowledge in that regard, then the jury's going to get it. But if the evidence is as I've recited it here . . . for example, completely contradicted by the board members themselves under oath and without any substantial contradiction when they were testifying, if that's all we have, then this constitutional claim, I think, fails.

(*Id.* at 171-73.)

Plaintiffs then presented argument aimed at persuading the court to be inclined otherwise and to deny Defendant's Rule 50 Motion. (*Id.* at 173-85.) The court turned to a part of its jury instructions

and sought comment from both sides about whether the court's statement of law was accurate. (*Id.* at 185-87.) The court added, importantly, that it considered an addition to the definition of arbitrary and capricious in the jury instructions, "*assuming that this goes to the jury.*" (*Id.* at 187.)

Describing the length and complexity of the trial testimony implicated by Defendant's motions, the court stated, "it would be great to have all of this testimony completely memorized and at one's fingertips, but it has been a bit of a long trial. And Mr. Addis, it may be a better thing to allow the jury, to simply reserve on these Rule fifties and allow the jury to make a determination, but I want to hear your comment, your wrapups." (*Id.* at 188.) Mr. Addis reiterated arguments in support of Defendant's motions. (*Id.* at 188-98.)

The court then asked what harm or prejudice would result for Defendant if the Rule 50 motions were taken under advisement. In the court's view, the jury verdict would either render the motions moot or not factor into the frozen record that would support or not support Defendant's motions. (*Id.* at 198-99.) The court heard Defendant's points about jury confusion and asked Plaintiffs for "anything final on this point? This is the Rule 50 on the constitutional claim."[4] (*Id.* at 199-202.) Plaintiff presented some final argument in opposition to Defendant's Rule 50 motion. (*Id.* at 202-05.)

The court concluded proceedings on May 1, 2008 with the following:

> We may be at a point tomorrow morning where I'm going to have to tell the jury to come back on Monday for instructions and argument. We may not be able to instruct the jury tomorrow. I am unsure about that. Eight-thirty. We'll see you then, counsel.

(*Id.* at 205.) The following morning, the court announced its decision to reserve the Rule 50 motions.

> [A]ll pending Rule 50 motions are going to be reserved. I will not grant or deny any. Principally, I rely upon the complexity and depth of the record. The record has not been produced in official form, nor in its final form, at least, nor have counsel had a reasonable opportunity to delve into the record sufficiently, I think, to support either their contentions or their responses to contentions with respect to lack or record support for various propositions and so forth.
>
> We had a vigorous discussion yesterday, an informative discussion, but I view it as a prelude to possible later argument. And the Court reserves, shall we say, the right to be persuaded at a later time.

(5/2/08 Tr. at 3, Pls.' Reply Br., Ex. 2.)

This somewhat lengthy review of the transcript is necessary to prove this negative: Plaintiffs never made a motion on the record under Rule 50 before the verdict was rendered. The arguments presented were oriented without fail toward defending against Defendant's Rule 50 motions. Because Rule 50(b) is limited to *renewed* motions, *see Bolt*, 106 F.3d at 160, Plaintiffs may not rely upon the mere general statement that they reserved their right to move for relief under Rule 50. Having reserved the right, Plaintiffs never raised an issue, a count or another component of the case that might entitle them to judgment as a matter of law. Rather, they sought a jury determination of their claims, arguing against the judgment as a matter of law that Defendant sought. Plaintiffs' failure to raise any grounds for Rule 50 relief before the verdict is fatal to their attempt to raise new grounds post-verdict. The Sixth Circuit has articulated the policy underlying Rule 50 as "to narrowly restrict the grounds used to overturn a jury verdict by requiring that parties raise important issues *before* the case is submitted to the jury." *Id.* (emphasis in original). With respect to the parking revenue and the constitutional claim, Plaintiffs simply raised no grounds in their favor for judgment as a matter of law. The transcript is silent on the other issues in their pending motion - gross ticket sales revenue and the food and beverage service agreement. The procedural bar against Plaintiffs' Rule 50 motion thus cannot be surmounted, and for this reason the court must deny Plaintiffs any requested relief under Rule 50.

2. New Trial

Plaintiffs seek alternative relief of a new trial under Federal Rule of Civil Procedure 59, which authorizes the court to grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The procedural bar against Plaintiffs' Rule 50 motion extends to preclude any Rule 59 motion raising insufficient evidence for the jury's verdict as the grounds for relief. *See, e.g., ICP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 545 n.2 (6th Cir. 1981) ("A motion for judgment [NOV] cannot be entertained unless the moving party has made a timely motion for a directed verdict at the close of all the evidence."); *Southern Railway Co. v. Miller*, 285 F.2d 202, 206 (6th Cir. 1960) ("No motion for directed verdict having been made, the question of the sufficiency of the evidence to support the jury's verdict is not available as a ground for a motion for new trial."). Accordingly, Plaintiff may not seek a new trial on the grounds that the jury had insufficient evidence for its verdict (1) awarding $21,930 to Defendant for 1% of gross ticket sales revenue, (2) finding that Defendant did not violate Plaintiffs' substantive due process rights, (3) awarding zero dollars to Hillside for Defendant's breach of contract involving parking revenues and (4) finding that Defendant did not breach the food and beverage agreement.

The final issue Plaintiffs raise is whether the court should grant a new trial because "the jury's verdict was improperly influenced or was otherwise unfair." (Pls.' Br. at 14.) Plaintiffs' argument relies

upon three sub-parts: (1) admission of evidence concerning advice of counsel, (2) admission of Fifth Third Bank documents and (3) improper conduct of Defendant's counsel.[5]

Regarding advice of counsel, the court denied Plaintiffs' earlier motion in limine, finding that Defendant would not rely on advice of counsel as an affirmative defense and that such evidence was therefore not relevant to any fact of consequence in the case. (11/6/07 Order at 5-11.) The court's prospective view proves true in retrospect, as Defendant in fact presented no such defense at trial. While certain witness testimony touched upon advice of counsel, it did so in a tangential way and not with the effect of suggesting to the jury that Defendant simply followed the advice of counsel and should therefore not be held liable. Evidentiary rulings fall within the broad discretion of the district court, *Conklin v. Lovely*, 834 F.2d 543, 551 (6th Cir. 1987), and a new trial is proper only when an abuse of discretion has a substantial effect on the final result. *See Leonard v. Uniroyal, Inc.*, 765 F.2d 560, 567 (6th Cir. 1985); *In re Air Crash Disaster*, 86 F.3d 498, 526 (6th Cir. 1996). Because the challenged evidence constituted a small portion of a nearly month-long trial and did not relate to an actual defense, the court finds that Plaintiffs were not prejudiced by a substantial effect on the final result that would warrant granting a new trial. Further, the court provided the jury with lengthy jury instructions and a verdict form that Plaintiffs had every opportunity to shape with the court, and those instructions would cure putative evidentiary defects that are minor when viewed in context.

The same reasoning applies to Plaintiffs' argument concerning the Fifth Third Bank documents. The court is not persuaded that these documents were a "surprise" that improperly influenced the jury's deliberations. Plaintiffs failed to object to this evidence when it was admitted, and the court is not convinced that any particular unfair emphasis placed on these documents should occasion undoing the lengthy trial. The court therefore concludes that a new trial is not warranted on these grounds, as Plaintiffs have not shown an abuse of discretion that had a substantial effect on the outcome of trial. *Conklin*, 834 F.2d at 551; *Leonard*, 765 F.2d at 567; *In re Air Crash Disaster*, 86 F.3d at 526.

With respect to the alleged misconduct of counsel, Plaintiffs raise isolated moments in a lengthy trial. Even if the court accepts Plaintiffs' characterization of counsel's misconduct, it fails to rise to the level that the trial must be considered unfair, fundamentally flawed, or otherwise crying for the remedy of a new trial. As a general matter, where counsel's comments drew no timely objection there must be clear prejudice that would justify a new trial. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1939). Further, the court instructed the jury to not consider the arguments of counsel as evidence. (Jury Instructions at 4-5.) Courts presume that the jury followed instructions and reviewed the evidence for its proper purpose. *See, e.g., Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). Accordingly, the court finds that the

alleged misconduct of Defendant's counsel fails to constitute sufficient grounds for a new trial.

IV. CONCLUSION

IT IS ORDERED that "Defendant's Renewed Motion for Judgment as a Matter of Law" [Dkt. # 259] is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial [Dkt. # 261] is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: August 28, 2008

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, August 28, 2008, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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[1]The court later ruled that Defendant was entitled to its one-quarter share of any parking revenue collected by Plaintiffs that Defendant could prove Plaintiffs never shared, but the court left

determination of damages, if any, to the trier of fact. (6/14/07 Order at 3-5.)

[2] The court notes with some dismay that Defendant's brief cites to the wrong exhibit (Exhibit B) and, further, that the correct exhibit (Exhibit A) only contains two of the nine transcript pages cited - pages 129 and 132. (Def.'s Br. at 3 (citing Ex. B at 124-32); Def.'s Ex. A.)

[3] Defendant, meanwhile, filed several written motions under Rule 12 and Rule 50 before the court took them under advisement and instructed the jury. [Dkt. ## 228, 233, 235-36, 238.]

[4]In this context, the court views its statement concerning "the Rule 50 on the constitutional claim" as referring exclusively to Defendant's motion for judgment as a matter of law on Plaintiffs' constitutional claim. The surrounding exchange makes no explicit reference or implicit suggestion that Plaintiff moved for judgment as a matter of law on the constitutional claim.

[5] In a footnote, Plaintiffs argue that two witnesses should have been excluded under Federal Rule of Civil Procedure 37 because Defendant "refused to produce them for deposition at any time during discovery." (Pls.' Br. at 16 n.3.) Defendant disputes Plaintiffs' characterization that it refused to produce the witnesses. (Def.'s Resp. at 29.) Without deciding that matter, the court finds that Plaintiffs' argument lacks meaningful articulation of how the failure to exclude these witnesses resulted in

prejudice that would merit granting a new trial. The court therefore rejects these grounds for a new trial.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HILLSIDE PRODUCTIONS, INC., GARY RONCELLI and JOSEPH VICARI,

Plaintiffs/Counter-Defendants,

v. Case No. 06-CV-11566

COUNTY OF MACOMB

Defendant/Counter-Plaintiff.

JUDGMENT

This action was brought to trial, and the issues having been duly tried and the jury having rendered its verdict on May 5, 2008, and consistent with the jury verdict.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Judgment of no cause of action is granted to Defendant/Counter-Plaintiff County of Macomb, Michigan ("Macomb") on the claims of Plaintiffs/Counter-Defendants Hillside Productions, Inc. ("Hillside"), Gary Roncelli and Joseph Vicari for violation of substantive due process brought pursuant to 42 U.S.C. §1983.

2. With regard to this Court's ruling of March 26, 2007 that Macomb breached its contract with Hillside with respect to Hillside's 75% share of parking revenue for non-Hillside sponsored events, Hillside is awarded damages in the amount of **zero dollars**.

3. Judgment of no cause of action is granted to Macomb on Hillside's claim that Macomb breached its contract with Hillside with respect to providing security outside the amphitheater.

4. Judgment of no cause of action is granted to Macomb on Hillside's claim that Macomb breached the Agreement for Food and Beverage Service at the Independence Building at Freedom Hill County Park with Hillside by refusing to allow Hillside to make improvements at the Independence Building.

5. Judgment of no cause of action is granted to Hillside on Macomb's claim that Hillside breached its contract with Macomb with respect to the payment of Macomb's share of parking revenues.

6. Judgment of no cause of action is granted to Hillside on Macomb's claim that Hillside breached its contract with Macomb with respect to the payment of Macomb's share of advertising revenues.

7. Judgment is granted in favor of Macomb on its claim that Hillside breached the sublease and its amendments with respect to the

payment of the 1% gross ticket override, and Macomb is awarded damages in the amount of **$21,931.00**.

8. Judgment of no cause of action is granted to Hillside on Macomb's claim that Hillside breached its contract with Macomb with respect to Hillside's failure to obtain the County's approval for improvements made to the amphitheater is dismissed for no cause of action.

9. Judgment is granted in favor of Macomb on its claim that Hillside breached the Agreement for Food and Beverage Service at the Independence Building at Freedom Hill County Park by failing to make payments, and Macomb is awarded damages in the amount of **zero dollars**.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: May 30, 2008

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, May 30, 2008, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HILLSIDE PRODUCTIONS, INC., GARY RONCELLI and JOSEPH VICARI,

Plaintiffs/Counter-Defendants,

v. Case No. 06-CV-11566

COUNTY OF MACOMB

Defendant/Counter-Plaintiff.

OPINION AND ORDER DENYING PLAINTIFFS' OCTOBER 19, 2007 MOTION *IN LIMINE*

Pending before the court is Plaintiffs' "Motion *In Limine* . . . ," which was filed on October 18, 2007.[1] Defendants County of Macomb and Macomb County Parks and Recreation Commission ("MCPRC") responded on October 26, 2007. The matter is fully briefed and the court concludes that a hearing is not necessary. *See* E.D. Mich. LR 7.1(e)(2). The court will, for the reasons stated below, deny Plaintiffs' motion.

I. BACKGROUND

Plaintiffs assert various claims arising out of its business relationship with Defendants, which calls for Plaintiffs to operate the Freedom Hill

Amphitheater, Defendants' asset, in exchange for certain money and revenue sharing. Specifically, Plaintiffs allege a number of claims that sound in contract and tort law, including alleged deprivation of constitutional rights in violation of 42 U.S.C. § 1983. The current dispute centers around Plaintiffs' discovery requests concerning the alleged reliance of the MCPRC on the advice of corporation counsel,[2] including an internal memorandum, with respect to certain MCPRC decisions and conduct. The main issues are (1) whether the discovery is relevant to any fact of consequence in this case and (2) whether the attorney-client privilege is waived as it pertains to that discovery.

The court will focus on the arguments of the parties, as a detailed recitation of the underlying facts is unnecessary. Plaintiffs contend that three categories of otherwise privileged communications between MCPRC and counsel are relevant to Plaintiffs' claims and Defendants' defenses and counterclaims: communications concerning (1) whether Defendant "Macomb County was entitled to keep all parking revenue from non-Hillside-sponsored events," (2) "the recommendation of counsel included in the MCPRC-approved motion of October 12, 2005" and (3) "the authority of the Board of Commissioners to approve Hillside's request for consent to an assignment of the sublease agreement."[3] (Pls.' Mot. at 8.)

It appears that Plaintiffs' primary argument is not that the discovery is relevant to Plaintiffs' burden of proof for any of its claims. Rather, Plaintiffs "are concerned that [D]efendants will

raise at trial the defense that they acted in good faith or that they have some 'qualified immunity' because they allegedly relied on advice of counsel, and therefore did not intentionally violate [P]laintiffs' due process rights." (*Id.* at 37.) Plaintiffs further "maintain that if [D]efendants intend to rely on advice of counsel as a defense to the claim of coercive extortion as a deprivation of constitutional rights, discovery as to that advice of counsel is relevant and should be discoverable." (*Id.* at 38.) With respect to the deprivation of Plaintiffs' equal protection rights, Plaintiffs suspect that Defendants will claim a defense of rational basis predicated upon advice of counsel. (*Id.* at 38-39.) Plaintiffs are unsure whether Defendants will raise such defenses and therefore ask the court to either allow the discovery or preclude Defendants from asserting such defenses. (*Id.* at 37-38.)

Elsewhere, Plaintiffs argue that Defendants have in effect invoked such a defense in public statements and in prior motion practice before this court. (*Id.* at 39-41.) Plaintiffs further characterize Defendants as pleading an alternative defense that, relying on advice of counsel, Defendants merely held certain revenue for an indefinite period and never intended to keep it. (*Id.* at 39-40.) Separately, Plaintiffs cite deposition testimony to the effect that Defendants' knowingly improper withholding of revenue was a negotiation tactic meant to "bring these boys [Plaintiffs] back to the table," (*id.* at 40), which Plaintiffs claim would support their claims under 42 U.S.C. §§1985(3) and 1986, (*id.*).

Plaintiffs also argue that the attorney-client communications regarding parking revenue are relevant to their claim of consequential damages and to their defense against the breach of contract and tort counterclaims. (*Id.* at 41.) According to Plaintiffs, if Defendants knew they were not entitled to certain revenue, "then [D]efendants cannot assert that they relied on the advice of counsel as a defense to [P]laintiff's claims for consequential damages for [D]efendants' breach of contract without disclosing that advice of counsel. (*Id.*)

With respect to the other two categories of attorney-client communication, the sum of Plaintiffs' argument is the following

> this relates to [Plaintiffs'] claim under Section 1983 that [D]efendant's intentional withholding of this consent in order to extort concessions to which they were not entitled by forcing Hillside to re-negotiate of [sic] the sublease itself violated [P]laintiff's constitutional rights and serves as one of the acts in the pattern and practice of which [P]laintiffs complain.

(*Id.* at 42.)

Defendants respond that qualified immunity is a defense to individual liability and that Plaintiffs have not sued anyone in that capacity. (Defs.' Resp. at 18-19.) Defendants disavow raising a qualified immunity defense on behalf of MCPRC or the Board of Commissioners as a municipal body. (*Id.* at 19.)

Specifically, Defendants claim they "have not raised reliance on the advice of counsel as an affirmative defense to any of Plaintiffs' claims." (*Id.* at 20.) Defendants concede that, under some circumstances, a party may waive its attorney-client privilege, but they deny having done so in this case. (*Id.*) Defendants further attack the relevance of the discovery, arguing that (1) a municipal body's resolutions and minutes speak for themselves and (2) Plaintiffs have failed to show that a majority of the MCPRC members' votes were improperly motivated. (*Id.* at 20-27.)[4]

II. DISCUSSION

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Generally, relevant evidence is admissible and irrelevant evidence is inadmissible. Fed. R. Evid. 402. The court decides in its discretion what evidence is admissible. *See e.g. Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 298 (6th Cir. 2007).

The court is not persuaded that Plaintiffs have made a sufficient threshold showing of relevance. As Defendants have now confirmed, they will not assert a defense of qualified immunity, and the court intends to hold Defendants to that representation. Without this defense, the disputed evidence makes no fact of consequence any more or less likely. The court further notes that there is no issue of individual liability in this case, as

Defendants are solely local government bodies. The bulk of Plaintiffs' argument for relevance therefore lacks a predicate in this case and Plaintiffs are assured, as they requested in the alternative, that Defendants shall not later rely on such a defense.

The same analysis applies to other anticipated defenses, as Defendants have plainly stated, "Defendants have not raised reliance on the advice of counsel as an affirmative defense to any of Plaintiffs' claims." (Defs.' Resp. at 20.)[5] The court therefore finds that the other manner of defenses that Plaintiffs expect find no predicate in this case and therefore provide no basis for a determination that the requested discovery is relevant. For the same reason, the court rejects Plaintiffs' contention that Defendants have functionally raised such defenses.

Moreover, the court has already addressed Plaintiffs' theory that Defendants coerced them into modifying their contractual relationship:

> In sum, the court concludes that there is no question of fact concerning the viability, or lack thereof, of Plaintiff's theory of unenforceability. As discussed above, the parties' course of conduct and the court's construction of the unambiguous terms of the contract support a finding as a matter of law that the parties' agreement is valid and enforceable. The court's opinion forecloses Plaintiffs' theory that it entered the agreement under duress

> and that enforcement of the agreement is improper. The court's analysis does not reach Plaintiffs' other theories of recovery, including, for instance, alleged lost business and other claimed consequential damages.

(6/14/07 Order at 10.) As such, the law of the case doctrine precludes some or all of Plaintiffs' claims of coercion, which would in turn forbid discovery that is irrelevant because it concerns an already dismissed theory of recovery. *See e.g. United States v. Robinson*, No. 06-5787; ___ F.3d ___; 2007 WL 2780499 (6th Cir. Sep. 26, 2007) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). With respect at least to affirmative defenses, court therefore sees no adequate grounding in relevance for Plaintiffs' requested discovery.

Plaintiffs appear to also argue that the requested discovery is relevant to their burden of proof. Namely, Plaintiffs seek to prove that the MCPRC had an improper motive when it voted to do certain things to Plaintiffs, including withholding parking revenue. Section 1983 liability for a governmental entity requires a showing of "an unconstitutional action that implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . ." *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). Where an official action on its face evidences no improper motive, a plaintiff must prove that the public body acted out of a constitutionally impermissible motive. *Id.* *Scarbrough* concerned a former school

superintendent's § 1983 claim against a county education board and some of its individual members for not appointing his as director of schools. *Id.* at 253-54. With respect to the board of education, the Sixth Circuit applied a "but for" test that holds the governmental body liable "for actions that it would not have taken 'but for' members acting with improper motive." *Id.* at 262 (citations omitted). Though the Sixth Circuit applied this test in the context of reversing a grant of summary judgment for the board of education, this court concludes that the test equally applies in the procedural context of Plaintiffs' motion *in limine*. In other words, the purpose of the requested discovery is to find evidence tending to prove or disprove that Plaintiffs' can meet the but for test.

The parties dispute whether Plaintiffs have presented adequate evidence showing that a majority of the MCPRC voted in reliance on the advice of counsel. Resolving this argument is key because Plaintiffs contend that, if Defendants had an improper motive, it was contained in, and perhaps disguised by, the advice of counsel. From the standpoint of relevance, Plaintiffs need not show at this early juncture whether there in fact was such an improper motive; indeed, without the requested discovery in hand Plaintiffs cannot make such a showing. Plaintiffs have had the opportunity, however, to explore whether the MCPRC as a whole relied upon the advice of counsel, whatever the content of that advice.[6] In the absence of such reliance, the discovery is irrelevant, as it would not tend to prove or disprove that the MCPRC acted

with a constitutionally improper motive. *See id.* at 261-63.[7]

Though Plaintiffs suggest that the minutes of the MCPRC "cannot be deemed accurate in all cases," (Pls.' Reply Br. at 5), the court must nonetheless rely on the record before it. The minutes presented indicate that during the pertinent time period MCPRC had eleven voting members. (3/23/06 Minutes, Pls.' Ex. 1; 3/28/06 Minutes, Defs.' Ex. 2; 10/12/05 Minutes, Pls.' Ex. 23.) Therefore, to establish as a preliminary matter the relevance of the advice of counsel, Plaintiffs must show that at least six MCPRC members relied upon that advice when they voted to withhold parking revenues from Plaintiffs.[8] The record does suggest that the vote was unanimous. (3/24/06 Detroit News Article, Pls.' Ex. 4.) The record, however, fails to establish that at least six members voting yes relied on the advice of counsel.

The court's review of the record reveals the following members making statements that their votes relied on the advice of counsel:

1. Phil DiMaria told a local newspaper, "[b]ased on our legal counsel's advice, I voted not to pay [Plaintiffs] the extra parking fees any more."

2. Anthony Lipinski averred that "I would have always deferred to corporation counsel." (Lipinski

Dep. at 23, Pls.' Ex. 12, Defs.' Ex. F.)[9]

3. Thomas Raymus stated that he had difficulty understanding the contract and "only went by what our attorney said." (Raymus Dep. at 13, Pls.' Ex. 15.)

4. Eugene Schabath, who reported to public works commissioner Anthony Marrocco, was advised by Marrocco to "base your decision on what the corporation counsel has to say." (Schabath Dep. at 17-19, Pls.' Ex. 19.)[10]

While other members may have made oblique reference to the advice of counsel (*see e.g.* Slinde Dep. at 46-47, Pls.' Ex. 13), those statements did not assert that a vote relied upon such advice. In the case of Slinde, her statements concerned how the language of the contract arose and how a certain split of parking revenue began. Marvin Sauger, meanwhile, simply suggested "getting an outside attorney to look at this." (Sauger Dep. at 44-45, Pls.' Ex. 14.) Dino Bucci averred that he had discussions with counsel, but he described his own understanding of the contract. "[T]hat's my interpretation of it, and I firmly believe that that's what it means to me." (Bucci Dep. at 72, Pls.' Ex. 16.)

Finally, Plaintiffs present the testimony of Henry Riberas, the non-voting spokesman of

MCPRC. According to him, he did not attend a scheduled meeting with Plaintiffs after the parking revenue vote because

> the action taken by the County at that [10/23/06 MCPRC] meeting that were further confirmed by my personal meetings with Commissioner Perna, Bucci and my telephone calls with DiMaria and Sauger, based on what they told me then about, you know, their purpose in doing this, hatching this little plot to bring [Plaintiffs] back to the table, we weren't going to go to that meeting [on April 3, 2006].

Riberas Dep. at 204, Pls.' Ex. 22. Riberas described the purpose of the plot.

> Well, Commissioner DiMaria and Commissioner Bucci both indicated that they were fully aware that they weren't entitled to that money and that this play on the part of the Count was intended to do one thing. By this time the County had the Asset Purchase Agreement. They understood that [Plaintiffs] were going to personally receive parking revenues for three years. Mr. DiMaria said to me specifically that look, we know we are not entitled to this money, but our Legal Counsel says if nothing else, this will bring these boys back to the table. Bucci confirmed this. Both of them, well,

> Bucci let me read the memo. Mr. Perna quoted from the memo, as did Mr. DiMaria, and so it became very clear to us then what was really going on here.

(*Id.* at 205.)

At most, Riberas's testimony confirms DiMaria's vote relied on counsel, which the court has already established, and adds Bucci to the list, as Bucci allegedly "confirmed" the plot and the DiMaria's recitation of the alleged advice of counsel.[11] Riberas's remaining testimony is equivocal and attributes no particular improper statement, motive or action to Perna or Sauger. The court does not read Riberas's use of "they" as impugning the behavior of all four MCPRC members mentioned in the vicinity of that word. Without more clear deposition testimony and record evidence, the court finds that only a minority of MCPRC might have based their vote on the advice of counsel: DiMaria, Lipinski, Raymus, Schabath and Bucci.[12] As such, the record indicates that only five of the eleven MCPRC members may have relied upon the advice of counsel, whatever the content of the advice and whatever the motives of the individual members. Because any alleged improper motive depends in this case upon actual reliance on advice from counsel, Plaintiffs have failed to meet the "but for" test of *Scarbrough*. The requested discovery is therefore also irrelevant with respect to Plaintiffs' burden of proof for its claims, particularly under 42 U.S.C. § 1983, against Defendants.

III. CONCLUSION

IT IS ORDERED that "Plaintiffs' Corrected Motion *In Limine* . . ." [Dkt. # 146] is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: November 6, 2007

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, November 6, 2007, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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[1]Plaintiffs filed a corrected motion on October 19, 2007 [Dkt. # 146], which Plaintiffs' counsel asserts is identical in substance and different only to the extent that certain clerical errors were eliminated.

[2] The court will refer to Defendants' corporation counsel as, simply, "counsel."

[3]Categories 2 and 3 are intertwined to the extent that the record appears to describe the October 12, 2005 recommendation of counsel as concerning the authority of MCPRC and/or the Board of

Commissioners to assign the sublease. (Pls.' Mot. at 34-35) (citing DiMaria Dep. at 55-56, Pls.' Ex. 21).)

[4] Because the court will find that the relevance issue is dispositive, the court will not summarize the parties' arguments concerning whether Defendants waived their attorney-client privilege. The court does note, however, that it would not be inclined to conclude that stray remarks by individual members of a municipal body in select depositions and media sources would have the effect of binding the full municipal body to even a limited a waiver of the attorney-client privilege. Defendants' argument on this issue, (Defs.' Resp. at 29-33), is persuasive.

[5] The court reiterates that it will hold Defendants to this state of affairs, in the event that such defense is raised at a later point when further discovery is not feasible and when Plaintiffs may be prejudiced by such a change.

[6]The court finds that Defendants' objections to Plaintiffs' line of inquiry focused upon the content of the advice of counsel, not whether a deponent relied on such advice. Defendants thus did not halt questioning before Plaintiffs could explore whether any deponent relied on the advice of counsel.

[7]The parties have not briefed which Defendant, if any, had the requisite final authority to establish municipal policy. *Scarbrough*, 470 F.3d at 262. The court need not decide the question for purposes of its determination of relevance.

[8]The inquiry is complicated by the fact that the minutes merely indicate that the motion to retain parking revenues carried, without listing how each member voted. (3/23/06 Minutes at 2, Pls.' Ex. 1.) But there is record evidence indicating how some members voted and whether they relied on the advice of counsel. (*See e.g.* 4/2/06 Macomb Daily Article, Pls.' Ex. 6 (quoting MCPRC member Phil DiMaria saying, "[b]ased on our legal counsel's advice, I voted not to pay them [Plaintiffs] the extra parking fees any more.").) The court notes that it cannot infer from the four corners of the minutes that DiMaria, who made the motion, and Klein, who seconded it, voted yes. (3/23/06 Minutes at 2, Pl.'s Ex. 1.) A substantive position one way or the other does not necessarily follow a procedural action, as, for instance, DiMaria or Klein may simply have wanted to call the question and vote against the measure.

[9]The court rejects Defendants argument that Plaintiffs misrepresented the testimony of Lipinski. (Defs.' Resp. at 24.) While Lipinski's expressed "understanding" was "just to adhere to the contract that was agreed," a full reading of his testimony indicates that his understanding of the contract was based upon deferring to the advice of counsel. (Lipinski Dep. at 22-23, Pls.' Ex. 12, Defs.' Ex. F.)

[10]The court does not view this testimony as inadmissible hearsay, as Marrocco's statement as Schabath's superior is a legally operative act that is admissible in the same way that "you're fired" would be an admissible statement in employment litigation.

[11]The court is inclined to view the hearsay statements Riberas attributes to DiMaria and Bucci as admissible statements against interest. Riberas only claims that Perna read out loud from an internal memorandum and attributes no statement to Sauger.

[12]The court is aware that Riberas's testimony directly contradicts Bucci's claim that he had his own understanding of the contract. With respect to Bucci's reliance on advice from counsel, there is at least some basis for the court to conclude that Bucci did so rely. The court's analysis does not presume to decide a credibility contest between Riberas and Bucci.

Nos. 08-2232/2268

FILED
August 3, 2010
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HILLSIDE PRODUCTIONS, INC., ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

COUNTY OF MACOMB,

Defendant-Appellee/Cross-Appellant.

BEFORE: KEITH, CLAY and GRIFFIN, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in

the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk